IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF CITATIONS—Continued

TABLE OF CITATIONS—Continued

TABLE OF AUTHORITIES—Continued

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ARGUMENT

I. REVERSAL OF THE JUDGMENT BELOW WOULD NOT "UNDERMINE THE SECURITIES LAWS" AS THE SEC FEARS; RATHER, REVERSAL IS REQUIRED BY ACCEPTED PRINCIPLES OF STATUTORY CONSTRUCTION AND THE ECONOMIC REALITY OF COMPULSORY NONCONTRIBUTORY PENSION PLANS.

The SEC professes concern that reversal of the decision below would undermine the protections given inves-

tors under the securities laws. (SEC Br. 2, 3, 6, 36, 50-51, 100).[1] This is a familiar refrain (see, *e.g.*, the peroration of its brief in *SEC* v. *Sloan* at the last Term.)[2] But accepting the argument at face value, there is no justifiable basis for concern, for the judgment below can be reversed without "dilution of long-established principles of statutory construction of terms in the securities laws" (SEC Br. 6). Indeed, in order to reverse in this case it is necessary only to follow those principles, particularly the principle recognized in *Forman* that the focus of the securities laws limits their coverage and the principle in *Ernst & Ernst* that commonly accepted meaning is the guide to interpreting the language of those laws. What those principles require here is simply a holding that mandatory noncontributory pension plans are in a different universe of discourse from the world of capital investment which Congress addressed in the 1933 and 1934 Acts; a holding which in no way threatens the protection of genuine investors. On the other hand, affirm-

[1] "IBT Br." refers to our opening brief in No. 77-753; "Local 705 Br." refers to the opening brief of Local 705 and Louis F. Peick in No. 77-754; "NCCMP Br." refers to the brief of the National Coordinating Committee for Multiemployer Plans; "U.S. Br." refers to the brief tendered by the United States; "AFL-CIO Br." refers to the brief tendered by the American Federation of Labor and Congress of Industrial Organizations; "Pl. Br." refers to plaintiff-respondent's brief in this Court; "Pl. CA Br." refers to its brief in the court below; "SEC Br." refers to the brief of the Securities and Exchange Commission in this Court; "SEC CA Br." refers to its brief in the court below; "PROD Br." refers to the brief of PROD et al.; "Grey P. Br." refers to the brief of the Grey Panthers; "A." refers to the record Appendix in this Court.

"Compulsory" and "involuntary" will be used interchangeably as they apply to pension plans in which coverage is a mandatory incident of employment. The Securities and Exchange Commission will be referred to interchangeably as "the SEC" and "the Commission." "Our adversaries" will refer to plaintiff and the SEC, who have filed the principal briefs in favor of affirmance.

[2] Brief for the Securities and Exchange Commission, No. 76-1607, p. 38.

ance here requires the use of fragmentation and literalism in order to torture mandatory noncontributory pension plans into the securities laws categories of security and sale. And affirmance will create enormous potential liability for all such pension plans under the antifraud provisions and for many, if not most, such plans under the registration provisions as well. The SEC's efforts to minimize the scope of this potential liability can best be characterized as a series of carefully couched ambiguous suggestions which have the effect of giving with one hand and taking away with the other.

Thus, the SEC suggests that little liability would result if the antifraud provisions were held to be violated only where a pension plan failed to disclose its break-in-service rule. SEC Br. 26. But the SEC nowhere concedes that liability under the antifraud provisions should or can be so limited. The SEC quotes the statement in the Grubbs Report that if liability exists only with respect to participants who were led to expect a pension, claims by most terminated participants would be barred. SEC Br. 27. But again, the SEC nowhere states that liability should or can be so limited. Since the SEC elsewhere indicates that liability may be based on oral as well as written misrepresentations, SEC Br. 96-97, the ease with which disappointed participants could allege that they were led to expect a pension would as a practical matter undercut the effectiveness of any such limitation. The next palliative offered by the SEC is that a private plaintiff claiming under Rule 10(b)(5) must establish that the defendant acted with *scienter*. SEC Br. 28, n.22. But in the same breath the SEC notes that this Court has not yet decided whether scienter is also required under § 17(a) of the Securities Act and urges that neither that question nor the question whether an implied private right of action exists under § 17(a) need be reached in this case.

Although the rejection of retroactive liability would in no way deprive any, let alone "many investors, in future

schemes totally unrelated to pensions or the labor milieu, of protection from fraud" (SEC Br. 6) and is essential in the considered judgment of the agencies in which Congress has placed responsibility for the regulation of pension plans,[3] the SEC gratuitously suggests that the devastating effect on pension plans which led this Court to deny retroactive liability in *Manhart* should not deter the imposition of such liability here because " 'conscientious and intelligent administrators of pension funds' would not commit the type of fraud alleged here * * *." SEC Br. 29. Elsewhere, however, the SEC observes that "there may well be a temptation to over-promote the investment" and quotes testimony by a pension industry spokesman that oversimplification and an advertising sales approach are general problems and that plan documents are often incomplete and misleading. SEC Br. 73-74. Moreover, even the SEC draws back from the spectre of general retroactive liability with the guarded concession that if the antifraud provisions do impose a specific affirmative disclosure requirement, then "perhaps" the *Manhart* rationale would preclude the imposition of retroactive liability upon persons who acted in good faith, SEC Br. 29.

Led by its desire to assert jurisdiction over mandatory noncontributory employee pension plans, if only under the enforcement provisions of the 1933 and 1934 Acts, the SEC even displays a willingness to jeopardize the protection of investors under the antifraud provisions of the federal securities laws by arguing, contrary to interpretations which it has successfully urged in this Court, that those antifraud provisions do not impose any specific affirmative disclosure requirements but are instead only generalized prohibitions of fraudulent conduct. And in

[3] See the brief tendered by the United States on behalf of the Treasury and Labor Departments and the Pension Guaranty Corp., pp. 50-51.

contending that subjecting employee pension plans to coverage under the antifraud provisions of the securities laws would not conflict with the specific regulatory scheme provided in ERISA, the SEC hints that it would be appropriate for the courts to deny claims based on omissions of material facts where the disclosures required by ERISA have been made. SEC Br. 97-98. At the same time, the SEC states "there may be exceptional situations where a failure to make a disclosure which ERISA does not require would constitute a violation of the antifraud provisions * * *", SEC Br. 97, without offering any explanation of what would constitute such an "exceptional situation."

The pattern is clear. The seeming concessions are ambiguous and carefully couched hypotheticals offered only for momentary reassurance and only for purposes of this case.

Let there be no mistake about what is really at issue in this case. Although the grievance here masquerades as a claim of fraud and nondisclosure, the real attack is on the entire system of mandatory noncontributory private pension plans. (See Pl. Br. 61-62 n.56 and Prod. Br. 11 and 15-16 n.8) That system has enabled employers to pay pensions while keeping costs within an acceptable range by relying on pooled funds and actuarial projections which assume that many employee participants will never satisfy the eligibility requirements. If this attack succeeds, then every such pension plan will be an easy target for claims of fraudulent nondisclosure and misrepresentation by vast numbers of participants who did not attain eligibility.

The SEC points to the snail darter case, *TVA* v. *Hill*, 46 U.S.L.W. 4673, as a pertinent precedent. (SEC Br. 93-95, 101.) The proposition there reaffirmed, that it is for Congress to establish public policy, is one with which we are totally in accord; we only wish that the agencies which Congress has created would consistently keep faith with that principle. Congressional policy regarding the

subject matter of this case is, in our view, entirely clear; it was declared in a major enactment just four years ago —a statute designed to spell out in meticulous detail the time, place and content of the disclosure obligations of pension plans; to continue and rationalize administration of the pension laws; and to preserve the assets of pension funds against claims for failing to comply with legal duties of which they were unaware. That policy does not leave room for superimposing the disclosure obligations of the pension laws; and to preserve the assets of pension ERISA.

A. *Under Settled Principles of Statutory Construction There Is No Security*

"Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto." *United Housing Corp.* v. *Forman*, 421 U.S. 837, 849 (hereafter "*Forman*"). An appreciation of the "economic realities of the Local 705 pension plan (or any other involuntary, noncontributory pension plan) compels the conclusion that a participant in such a plan does not acquire a "security", as that term has consistently been construed.

1. Compulsory, noncontributory pension plans are not created by "promoters" (SEC Br. 3) for raising capital to fuel an enterprise which they will manage, but are established by employers (often, as here, in conjunction with the bargaining representative of the employees) to attract and maintain a stable labor force and to reward employees "for continuous employment with the same employer", *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 594.[4] The payment of benefits is financed from a fund

[4] The SEC points out that the plan in *Alabama Power* involved a single-employer plan, while the plan at issue here is a multi-employer one (SEC Br. 41). That is a distinction which makes no difference in this context. Multi-employer plans normally arise out of the economic necessities of the industries with which they are associated and serve for the participating employers the same purposes served by single employer pension plans. "Multi-employer plans are often found in industries characterized by numerous small and financially unstable employers." Melone, *Collectively Bargained Multi-Employer Pension Plans* at 7. Such small employers could not carry the administrative costs of a single-employer plan, and they enjoy other economies of scale in a multi-employer arrangement. Where "the employees' attachment to the trade is considerable" but "employment relationships are short-term", single-employer plans are not feasible because employees would never "acquire the necessary service credits to qualify for a pension benefit" (*id.* at 8-9). Moreover, by providing rewards for continuous employment with the same multi-employer group, the plans aid in the maintenance of an available employee pool for the entire industry.

Thus, while we of course do not contend that *Alabama Power* is a *precedent* on the meaning of the securities laws, cf. *id.* at 592-593, n.16, it provides an instructive and accurate description of the economic reality of compulsory noncontributory pension plans such as that in this case.

to which the employer contributes periodically; that contribution may be, but need not be measured by the labor of any individual. (See IBT Br. 38-39.)

The employee for his part performs labor for the employer for which the major financial consideration he receives is his wage or salary; and he may also receive other fringe benefits, such as the possibility of future pension rights if he remains in covered employment for the requisite time, and, where the plan rules so provide, with the requisite continuity. The employee places no money into the fund which is the source of the pension benefits. He does not acquire an "interest" in the fund. (See IBT Br. 11-12, 40.) The value of the pension benefit he ultimately receives is related only indirectly, if at all, to the employer contributions made with respect to his labor,[5] and even more remotely to the investment

[5] As noted in *Alabama Power*; "Periodic adjustments of the benefit formulas to account for unanticipated increases in living costs * * * emphasize the dissociation of payment levels from the work that * * * the payments compensate." (431 U.S. at 594.) Moreover, many plans, like the 705 plan, credit employees for service performance before the plan is instituted, and with respect to which no contributions have been made. In sharp contrast, mutual funds and variable annuity funds, to which analogy is pressed (Pl. Br. 12, 38, 59, 61), recalculate the cost to new purchasers periodically (in the case of some mutual funds twice daily) to reflect the changing value of shares or units.

performance of the fund. Indeed, the major portion of the benefit is traceable to contributions made with respect to the labor of individuals who will never qualify to receive a pension. (See IBT Br. 46-48.) The investment return is not only a small fraction of the total size of the fund, but does not necessarily redound to the benefit of the employees; in a defined benefit plan such as this, it may serve rather to reduce the employer's contribution. See IBT Br. 44-45.[6] And, even as the employee does not participate, except remotely, in the pension fund's investment success, so its lack of success reduces his pension if at all, only indirectly. By "risk of loss", the court below meant the risk that a pension plan participant may never receive a pension, a risk which relates to his inability, often through no fault of his own, to satisfy the eligibility requirements for a pension. This is unlike an investor's risk of loss, which is that the interest he acquires by contributing capital may not produce the anticipated yield or may decline in value.

The foregoing characteristics (and others described at IBT Br. 33, 37-38) differentiate compulsory noncontributory pension plans from "investment contracts" and any of the other "many types of instruments that in our commercial world fall within the ordinary concept of a secu-

[6] Pl. Br. 10, n. 20 quotes a portion of a footnote of the AFL-CIO's discussion of this point, and totally distorts its meaning. The AFL-CIO's position was:

> The investment success of a defined benefit plan will be to the advantage of the employee participant only if the employer (or employers, in a multi-employer plan) who sponsors the plan chooses to raise the level of benefits. (AFL-CIO Br. 13.)

The footnote from which plaintiff quotes reads in full:

> Of course, where the level of the defined benefits is collectively bargained, employers generally will be more willing to promise higher benefits to the extent that the contributions required are less because of the plan's investment income; but there too, the impact on the employees is indirect, and their own bargaining strength is at least an equally significant fact. (*Id.*, n. 16.)

rity." H.R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933). They demonstrate that the Local 705 pension plan and others like it serve an important function in the labor market, that their form and substance is molded to serve a labor market purpose, and that they are not established "to raise capital for profit-making purposes" (*Forman*, 421 U.S. at 849). Therefore, like the housing cooperative in that case, they are beyond the "focus of the [1933 and 1934] Acts [, which] is on the capital market of the enterprise system." (*Id.*)[7]

2. Thus, if the reasoning and methodology of *Forman* is followed, the judgment below would be reversed without any adverse effect on the securities laws' operation in the area of their intended coverage. It is observed at SEC Br. 46 that the foregoing language appeared only where the Court was discussing the term "stock" in the definition of "security" rather than in its discussion of the term "investment contract", which is in issue here.[8] But this in no way diminishes the controlling significance of *Forman*. The Court's own words show that it was setting forth "the purpose of the Acts" and "the focus of the Acts" because it was "construing *these Acts* against the background of their purpose" (421 U.S. at 849, emphasis added). Indeed, this Court's quotation from the 1933 House Report which the SEC *also* says is "used by the Court in *Forman* only in its discussion of the term 'stock'" (SEC Br. 48), appears not only there (421 U.S. at 851) but also in the introduction to its entire discus-

[7] All this was well understood by the SEC in 1957. See the testimony and memorandum quoted at IBT Br. 71.

[8] Rather than come to grips with the real teaching of *Forman*, as it bears on, and we submit controls, this case, see IBT Br. 30-32, the SEC distorts the meaning of this Court's opinion beyond recognition: "In determining whether the 'stock' of the cooperative was the type of 'stock' which Congress contemplated, the Court appears to have considered it significant that the cooperative stock was not traded in the securities markets." (SEC Br. 46.)

sion of the definition of "security" (*id.*, at 847-848).[9] More fundamentally, there is implicit in the SEC's argument the paradoxical proposition that while the courts must look to the purpose of the securities laws to determine whether their literal language is applicable, and may on that basis avoid their literal meaning (as the Supreme Court did with the word "stock"), the courts need not consider that purpose in construing a more ambiguous term (like "investment contract"). *Forman* leaves no doubt that each of the terms within the statutory definition of "security", must be construed in terms of their purpose. Although the term "investment contract" "embodies a flexible rather than a static principle * * *" (*Howey*, 328 U.S. at 299), it is not infinitely elastic.

3. Our adversaries invoke the teaching of *Howey* that "the statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae."[10] We, of course, accept that principle, but insist that it does not establish that each element of a transaction which is said to negate the existence of an investment contract is automatically to be disregarded or to be examined in isolation. Thus, in *Howey* itself the fact that the transaction involved a sale of land was held not to affect the outcome because it was unnecessary to the basic transaction, which was determined to be an investment of money in a citrus growing enterprise rather than the sale of land; but that same fact could be significant in characterizing other transactions. In short, *Howey* poses the question in every case whether the factors relied upon *are* "unrealistic and irrelevant". The elements of a compulsory noncontributory pension

[9] The same technique is followed at SEC Br. 51 in responding to the United States' reliance on another passage.

[10] *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 301.

plan on which we rely, and which our adversaries would dispel by an incantation of *Howey*, are of the essence of such plans rather than incidental to them, and are therefore not only relevant but indispensable in determining whether there is an "investment contract."

We think that this appears with sufficient clarity from our original discussion of those elements, but it may be useful to examine some examples of what is deemed "unrealistic and irrelevant" on the other side (SEC Br. 36-43; Pl. Br. 24-25), for it may further illustrate the difference between us regarding what the securities laws are all about.

One fact which the Commission regards as "completely irrelevant" is that the employee may never obtain a pension because he gives up or loses his job; in its view that fact is germane only "to the relative merits, as an investment, of participation in a pension fund in comparison to other forms of investment," (SEC Br. 37). That fact, far from being irrelevant, is proof positive of the labor, and non-investment character of compulsory noncontributory pension plans. The Commission's very statement of its point inadvertently highlights one of the factors which distinguishes participation in such a plan from true investments: namely, that an individual cannot choose between "participation in a pension fund" on the one hand, or "other forms of investment", as he can choose between purchase of shares of this or that any of many thousand publicly traded securities, or real estate, bank savings plans, etc. There is almost an infinite variety of possible investments of money, some of which are and some of which are not subject to the securities laws. But the employment alternatives available to any individual at any time are sharply limited and, as we have stressed, involve numerous factors, one of which is

the compensation package, of which the pension plan is but one component.[11]

Moreover, the SEC is quite mistaken in drawing an analogy between the employee's risk that he will lose his pension because his employer goes out of business, with an investor's risk that his security will become worthless because the issuer goes out of business. In a word, the employee is not investing in his employer. Nor is he investing in his own capacity to perform his job adequately, although if he is discharged he also loses the opportunity to earn a pension. Plaintiff's and the SEC's theory is that he is investing in a pension fund. And the possibility that a particular employee will lose his job has nothing to do with the investment success of the fund or any of the other factors which determine the value of the pension benefits received by eligible employees.

One argument at Pl. Br. 24 attributes to us the position that an employee cannot be an investor. Of course he can be, as when he purchases the employer's stock in an employee stock purchase plan. The employee is an investor because he puts up his own money to purchase the stock of his employer whereby he provides capital for

[11] At SEC Br. 50-51, yet another fear is expressed:

> To encumber the definition of "security" with factors relating to the motivation of particular individuals—which motivation may vary from individual to individual—would seriously hamper the goals of the Commission's enforcement program which include quickly identifying fraudulent activity and "nipping it in the bud" by immediately seeking injunctive relief in the federal courts.

Since nothing in the respective arguments of the IBT and the United States to which the foregoing is addressed (IBT Br. 32, 33; U.S. Br. 16), would call for examination of "the motivation to particular individuals", the raising of this spectre is but another tactic to avoid the precedential force of *Forman*. The SEC's point comes with particularly poor grace since it dismisses out of hand the difficulties of *defending* an action brought on its theory that there is a "sale" of an interest in a pension fund occurs whenever an employee accepts or remains in covered employment. *See* SEC Br. 88-89.

his employer's business. Such stock of course is a "security". That the sale of employer stock is limited to employees or even that it is part of a pension plan in the sense that the employees receive part or all of their return in the form of retirement benefits, does not alter the essential nature of a purchase of stock. Those facts, therefore, are "unrealistic and irrelevant' 'in the sense of that phrase as used in *Howey*. Accordingly, we have always acknowledged that this form of a pension plan (in which an employee does, of course, receive an "interest") involves a "security".[12] But it by no means follows that

[12] Plaintiff relies on the Illinois Securities Law, § 3-0, Ch. 121 1/2, Ill. Rev. Stat. § 137.3-0 exemption from registration for "securities issued by or pursuant to employee profit-sharing trusts or plans or employee pension trusts or plans" for his argument that the Blue Sky Laws support his claim that the pension coverage at issue is a security (Pl. Br. 78). The exemption, however, is for "securities" and whether or not an employee's coverage under a compulsory noncontributory pension plan is a security is exactly the question. If an employee has no security arising from his coverage then the registration provisions of Illinois law do not apply—there is nothing to exempt. *See* references to opinions by Attorneys General from various States to the effect that nontransferable certificates of a non-profit retirement plan or retirement system trust are not "securities" at CCH Blue Sky Law Rep. ¶ 1683.

Only by assuming his conclusion can plaintiff find support in either Illinois law or the Uniform Securities Act, § 402(a)(11) for his argument. Indeed the official Code comment to § 402(a)(11) addresses the question of "various kinds" of pension plans and suggests the need to exempt from registration only those voluntary contributory plans which might otherwise require registration:

> This exemption is designed to solve the problem which arises in those states whose Administrators take the position, also taken by the SEC, that employees' benefit plans of various kinds involve an offer of a security in the nature of an 'investment contract,' at least if participation is voluntary with each employee and he must contribute under the plan in order to participate. See Loss, *Securities Regulation* (1951 with 1955 Supp.), pp. 326-29. CCH Blue Sky Law Rep. ¶ 4932.

Plaintiff's alternative theory that a pension fund is a "certificate of interest in or participation in a profit sharing agreement" (Pl. Br. 83-84) is equally without merit.

Congress clearly recognized that profit-sharing plans and pensions plans were not one in the same. In 1926 it amended the tax laws

any other, let alone all other forms of pension plans in which the employee does not buy his employer's stock are securities. It is, indeed, one of the principal vices of our adversaries' argumentation that they refer indiscriminately to "pension plans" or "pension funds" without specifying the type of plan and thereby becloud the analysis of the status under the securities laws of the only type of plan involved in this case.[13]

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to add pensions to stock bonus and profit-sharing plans as categories of trusts exempt from tax, § 219(f), Revenue Act of 1926. If, as plaintiff suggests pensions are profit-sharing plans, there is no explanation for this congressional act. The distinction was carried forward by subsequent Congresses and is now incorporated in the Internal Revenue Code of 1954, § 401(d). The Regulations promulgated pursuant thereto amplify the differences between profit-sharing plans and pensions. Treas. Reg. § 1.401-1(a)(2)(i) and (b)(1)(i) (1978) define pension plans, while Treas. Reg. § 1.401-1(a)(2)(ii) and (b)(1)(ii) (1978) define profit-sharing plans. Moreover, there is no "profit-sharing" in the Local 705 pension plan as that term is understood in common parlance. The benefits paid under that plan do not constitute a share of the profits of any or all of the signatory employers. And while we deny that the pension fund makes a "profit" in any sense known to the securities laws (IBT Br. 43-50), it is in any event clear that in a defined benefit plan such as the Local 705 plan the amount of the value of a pension which those who are eligible receive is only indirectly, if at all, relative thereto. The two District Court cases cited at Pl. Br. 84 illustrate what a profit sharing agreement really is: in both cases individuals who put up money were thereby entitled to a percentage of interest in the income and profits deriving from the employer's enterprise. In the final analysis, a determination as to whether a compulsory, noncontributory pension plan falls within the purview of the federal securities laws is not advanced by a discussion as to whether the term "certificate of interest in or participation in a profit sharing agreement" can be stretched to include such a plan.

[13] For example, the headings of the SEC's brief assert that "The Commission has Consistently Taken the Position that Interests in Pension Funds Are Securities" and that "Congress Has Taken Action Consistent With the View that Interests in Pension Funds Are Securities" (SEC Br. 53, 58, headings). So stated, those propositions are not false, but they are materially misleading in the consideration of this case: for what the SEC is attempting to convey by those headings, and to establish is an administrative practice

There is a broad spectrum of pension plans, of which compulsory and noncontributory plans are at the opposite range from those pension plans which are financed in whole or in part by employee purchases of employer stock. It is not necessary in deciding this case to identify at what point between these types of plan a "security" may first be found; to consider for instance whether the SEC was right when it took the position in 1941 that voluntary contributory plans financed by a pool of securities not involving employer stock are "securities". For, as the Chief Justice has written:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond." [14]

4. Plaintiff invokes a sentence from Mr. Justice Brennan's concurring opinion in *VALIC*,

> Congress need not go through the initial travail of reenacting its general regulatory scheme every time a new form of enterprise in introduced, if that new form falls within the scheme's coverage.[15]

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and a Congressional understanding consistent with its present position that interests in compulsory noncontributory plans are securities. Since that more precise and germane assertion is insupportable, the brief resorts to the uniformative generality "pension funds".

[14] *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123, 127, footnote omitted.

[15] *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 93, quoted at Pl. Br. 37.

We fully agree with this proposition, but it does not aid plaintiff even standing alone; morever, by isolating this sentence from its context plaintiff has obscured the real significance for this case of Justice Brennan's observations on the legislative process.[16] For, compulsory non-contributory pension plans, unlike variable annuities and the other "[n]ovel, uncommon, or irregular devices"[17] arrayed at Pl. Br. 35-37, are not a "new form of enterprise" introduced subsequent to the 1933 and 1934 Acts; nor were they created to escape the force of those laws by adopting characteristics which are not material for determining whether "that new form falls within the [statutory] scheme's coverage." (See p. 15, *supra*). Moreover, unlike the situation in *VALIC*, and of paramount significance for present purposes, Congress has twice since the enactment of the securities laws "gon[e] through the travail" of enacting legislation directed specifically to pension plans, the WPPDA and ERISA. See IBT Br. 67-87.

Therefore, it is the sentence immediately following that quoted by plaintiff which bears most directly on the present case: "If there is deemed wise any adjustment of the regulatory scheme in the light of new developments in the subject matter to which it extends, Congress may make it." (359 U.S. at 93.) The "new developments in the subject matter" of pensions which gave rise to the WPPDA and ERISA were abandonment of the view that

[16] "Congress regulates by general statutes. The passage of a federal regulatory statute is a delicate balancing of many national legislative interests and political forces. Congress need not go through the initial travail of reenacting its general regulatory scheme every time a new form of enterprise is introduced, if that new form falls within the scheme's coverage. If there is deemed wise any adjustment of the regulatory scheme in the light of new developments in the subject matter to which it extends, Congress may make it." (359 U.S. at 93.)

[17] *SEC* v. *C. M. Joiner Leasing Co.*, 320 U.S. 344, 351.

pensions are gratuities and a growing awareness that many individuals have been disappointed in the expectation that they will receive a pension, either because they were misinformed, or because their pension plan was terminated before they achieved eligibility. Since Congress did respond to these developments by legislation tailored to this subject, respect for the authority of Congress to "adjust[] the regulatory scheme" precludes a holding that the securities laws are applicable. This is so even if it be assumed that absent WPPDA and ERISA, the new developments would have justified application of the securities laws, despite the passage of over forty years during which plans have operated without the slightest warning that they were subject to those laws and the SEC has neither asserted nor exercised jurisdiction. See IBT Br. 80-83, 60-62. The lesson which we draw from Mr. Justice Brennan's opinion in *VALIC* for situations in which Congress has enacted intervening legislation is therefore the same as the teaching of his opinion for the Court in *Califano* v. *Sanders*, 430 U.S. 99, discussed at IBT Br. 81-83.

B. *Under Settled Principles of Statutory Construction There Is No Sale*

The SEC fails to deal at all with our argument (IBT Br. 52) that the "disposition" element of sale cannot be found in the transactional context of the type of pension fund with which we are dealing here. Plaintiff passes it by with an *ipse dixit*: "Contrary to petitioner's assertion the plaintiff has acquired some sort of an interest in the Local 705 Pension Fund". (Pl. Br. 85). But see IBT Br. 11-12, 40.[18] Further, the transactions in which

[18] That an individual does not acquire an interest in a pension fund by accepting or remaining in covered employment is acknowledged, perhaps unwittingly, at SEC Br. 88 where (in order to differentiate this case from *Blue Chip*) it is said, "By contrast, the

an employee accepts a job, goes to work, or votes on a proposed collective bargaining agreement simply do not fit the "commonly accepted meaning" (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199) of words the "purchase" or "sale" whether or not those acts require a volitional element. On this, too, our adversaries are silent, although a "sale" and/or "purchase" is mandated by the literal language of the statutes and rules which plaintiff says provide him with a cause of action. On the other hand, when literalness serves his purpose, plaintiff enshrines it.

Plaintiff contends that because the statutory definition of "sale" in Section 2(3) of the 1933 Act does not expressly embrace the volitional act of an investment decision by the purported investor, there is no volitional requirement in order to make out a "sale" in this case (Pl. Br. 84-85). He points to cases in which courts have held that the purposes of the antifraud provisions of the securities acts would be served if the terms "purchase" and "sale" were deemed to include a forced sale where the essence of the fraud was to deprive the plaintiffs there of the opportunity for choice. (Pl. Br. 95) Plaintiff also cites this Court's decision in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, as "impliedly reject[ing] the 'volition argument'." As we have shown by the portion of that decision quoted at pp. 63-64 of our opening brief, the facts in *National Securities* demonstrate that there was a very real investment choice to be made by the individual voting shareholder, and this Court so recognized, 393 U.S. at 467.

Plaintiff seeks to advance his argument by reliance on SEC Rule 145 which rescinded Rule 133, the SEC's "no sale" *rule* with respect to corporate mergers and consolidation. Plaintiff errs in confusing that rule with the Commission's "no sale" *theory*, which is based on the statutory definition of "sale" and which the Commission has also followed with respect to pension plans. (See pp. 38-39 *infra*, where this point is fully discussed.) But as we show at IBT Br. 64-65, when the SEC adopted Rule 145, it recognized the volitional requirement but found that it is satisfied in the circumstance to which this rule is directed. The reasoning is the same as that of this Court in *National Securities*. Rather than meet this point, plaintiff excises from the SEC's statement those portions which refute his position, a tactic which unfortunately succeeded in the court below, see IBT Br. 65, text and note at n.51. To show just how seriously plaintiff has distorted the SEC's statement, we set forth in full in the margin the two paragraphs of the statement from which he quotes.[19]

employee who decides to retain his job makes a decision which results in his continuing to give value in the future to further his acquisition of an interest in the pension fund."

[19] "*Based on the Commission's experience in administering the provisions of the Act and Rule 133 thereunder, and having given consideration to the Disclosure Study Report and to the comments received on the Commission's published proposed revision of Rule 133 (Securities Act Release No. 5012, October 9, 1969)*, the Commission is of the view that the 'no-sale' approach embodied in Rule 133 overlooks the substance of the transactions specified therein *and ignores the fundamental nature of the relationship between the stockholders and the corporation and between stockholders.* [The fact] that such relationships are in part controlled by statutory provisions of the state of incorporation does not preclude as a matter of law the application of the broad concept of 'sale' as contained in Section 2(3) of the Act. The concepts of 'sale,' 'offer,' 'offer to sell,' and 'offer for sale' in Section 2(3) are broader than the commercial or common law contractual meanings of such terms.

"*Transactions of the character described in Rule 133 do not in the Commission's opinion occur solely by operation of law and without the element of individual stockholder volition. A stockholder faced with a Rule 133 proposal must decide on his own volition whether or not the proposal is one in his own best interest.* The basis on which the 'no-sale' theory is predicated, *namely, that the exchange or alteration of the stockholder's security occurs not because he consents thereto but because the corporation by authorized corporate action converts his securities*, in the Commission's opinion, is

But even assuming that there are some contexts, where voluntary decisional acts are not essential to "purchase" and "sale",[20] this Court made the point in *National Securities* that the "terms 'purchase' and 'sale' ", like all other terms of the securities laws, can only be fully defined by the context in which they are being employed. And the court took pains in *National Securities* to make it clear that the meaning which it there gave to the terms "purchase" and "sale" was limited to the precise context of that case (*Id.* at 466-467, see also *id.* at 465).

In this case, plaintiff contends that he purchased a "security", to wit, an interest in a pension fund, but was deceived in the making of that purchase by misrepresentations and omissions to state material facts pertaining to that "security." In such a context, an investment decision is an essential element.

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at best only correct in a formalistic sense and overlooks the reality of the transaction. The corporate action, *on which such great emphasis is placed,* is derived from the individual consent given by each stockholder in voting on a proposal to merge, *consolidate or reclassify a security. In voting, each consenting stockholder is expressing his voluntary and individual acceptance of the new security, and generally the disapproving stockholder is deferring his decision as whether to accept the new security or, if he exercises his dissenter's rights, a cash payment.* The corporate action *in these circumstances,* therefore, is not some type of independent fiat but is only the aggregate effect of the voluntary decisions made by the individual stockholders to accept or reject the exchange. Formalism should no longer deprive investors of the disclosure to which they would be entitled, and admittedly should have."

Securities Act Release No. 5246, CCH Federal Securities Law Rep., 1971-1972 Dec., ¶ 78,753, p. 81,567. (Italics indicate the omissions at Pl. Br. 95; the phrase shown by brackets was added by plaintiff without so indicating.)

[20] This Court's decision in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, may be read as a disapproval of the cases which have so held, but it is not necessary to the outcome of the "sale" question in this case that it be so read.

The Commission also points to instances in which courts have held that there are situations where there can be a "sale" without "voluntary action by the alleged purchaser" (SEC Br. at 85). However, although its position on the need for employee-purchaser volition in order to make out a sale *in the context of this case* is hardly as unambiguous as one would hope for when the agency charged with enforcement of the Act speaks, we believe the Commission accepts that volition is required here (SEC Br. 85-86). However, it urges that a "voluntary decision * * * sufficient to satisfy the 'sale requirement' under the antifraud provisions of the securities law" is found when "representations about a pension affect a person's initial decision to take a job" and "thereafter in his decision whether to retain the job and its accompanying pension or to seek a different job with a different pension or no pension." (SEC Br. 84-85).[21]

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[21] The SEC asserts that the extent of job mobility in this country, makes the "decision whether to change jobs and [hence] pension coverage a matter of continuing importance" (SEC Br. 85). It attempts to demonstrate the importance of this "investment decision" by reference to Bureau of Labor Statistics which show an annual shift of 10% of the labor force from one job to another. The Commission's attempt to link turnover rates with individual pension decisions does not comport with the evidence. Such mobility is not a general characteristic of the labor force but only of young or recently hired employees. "[T]he propensity to move [to another job voluntarily] declines sharply with increasing length of service; it is slight after three years and negligible after ten years of work in the same plant." Reynolds, *The Structure of Labor Markets* (Harper & Row, 1951) p. 21. See also: Bernstein, *The Future of Private Pensions* (New York, N.Y., The Free Press of Glencoe 1964); McGill, *Fundamentals of Private Pensions*, Pension Research Council, Wharton School, University of Pennsylvania (Homewood, Ill., Richard D. Irwin, Inc., 3d ed., 1975), p. 82. The higher rate of mobility among young employees "reflects a period of adjustment to the job market while these young men look for a job which will provide adequate pay and opportunity for advancement." Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 90th Cong., 2d Sess. 249 (1968) Exhibit B to the testimony of Hon. Thomas R. Donahue, Assistant

Similarly, the Commission gives at least weak support (SEC Br. 86, n.75) to the proposition that if volition is required to make out a purchase and sale, it is supplied also in the context of a collectively bargained pension plan where the union's constitution or bylaws require membership ratification and the members vote to ratify (A. 244).

We acknowledge the possibility that an employee might take a job or remain on the job because among other reasons, including wages, vacations, working conditions, promotional opportunities, degree of effort, employer location and existence of union representation, the employee considered the pension plan. We also acknowledge the possibility that in voting approval of a proposed collective bargaining agreement an employee may consider pension provisions among all other terms and conditions of employment. We even would accept the proposition that an employee decision to vote against a union officer or to vote for decertification of a union might possibly be based in part on the employee's attitude toward the

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Secretary of Labor for Labor-Management Services, Department of Labor.

If pension plans had a major impact on the propensity of covered work force to change jobs one would expect this effect to be manifested in two ways: declining quit rates and increasing tenure in highly covered industries, especially among older employees who are close to meeting the requirements for vesting or early retirement. R. Taggart, "The Labor Market Impacts of the Private Retirement System," Studies in Public Welfare, 93 Cong., 1st Sess. 64 (1973). The data shows, however, that during the 1960's there was no increase in the median tenure of the work force, even for workers 45 years and older. (*Id.*) When the job tenure data is broken down by industry, focusing only on males 45 years old and over, "there is no evidence of correlation between pension coverage and tenure changes." (*Id.* at 65). Likewise, "Quit rate data show little evidence of the impact of retirement plans on labor mobility." Indeed, "Looking on an industry-by-industry basis, there is no apparent relationship between changes in quit rates over the sixties and either the incidence of coverage or the extent of contributions to private retirement plans (Table 21)." *Id.* at 65-66.

manner in which the union official or union had discharged their duties of representation with respect to, among other things, the negotiation of pension benefits. But it strains credulity to suggest that any of these acts, be they acceptance or retention of employment or ratification of a collective bargaining agreement, represent investment decisions which Congress intended to be within the purview of the securities laws. Just as an instrument is to be tested by "what character [it] is given in commerce" to determine whether Congress intended to include it under the rubric "security",[22] so should the concept of "purchase and sale" for the purposes of the securities laws, which presupposes an investment decision, be viewed as it would be so characterized in commerce. Taking or retaining a job or voting on a collective bargaining agreement would not be so characterized.[23]

Allowing a determination of the existence of a "sale" to turn on an employee's testimony as to his state of mind at the time he accepted or continued in employment invites even greater hazards than those delineated in *Blue Chip Stamps*. For in a *Blue Chip* context, the claimant's oral testimony would relate solely to the circumstances which led him to make a choice between the two alternatives, purchase or not purchase. In the context of this case, however, resolution of the purchase question would turn on oral testimony as to what relative weight, if any, was given to the decision to "invest in a pension" in the totality of all of the other considerations which went into the decision as to whether to accept a job or continue to work at that job thereafter. The social cost of opening the floodgates to litigation which would turn on such evidence is self-evident, and this too presents

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[22] *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 352-53: *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 211; *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 847-48.

[23] Cf. *Lino* v. *City Investing Co.*, 487 F.2d 689, 694.

a case *a fortiori* to *Blue Chip.* What the SEC regards as an advantage of the antifraud provisions of the securities laws over ERISA—that they deal with "false or misleading representations [which] are made either orally, or in written materials other than the documents required by ERISA" (SEC Br. 96-97) only aggravates the problem. It is apparently the SEC's view that disappointed pension applicants should be able to bring claims long after the event on the basis of oral statements purportedly made by personnel department employees, hiring foremen, union stewards, and others about the terms of the pension plan or the prospects of an individual obtaining a pension.

Plaintiff's and the SEC's arguments that a "disposition for value" occurs in the context of a noncontributory plan when an employee performs services and an employer makes pension contributions are subject to essentially the same infirmities as the SEC's argument that lurking somewhere in the decision to accept a job there can be an investment decision which subjects the employment transaction to the federal securities laws. At IBT Br. 61-62 we urged that whatever may be the present view of a pension, the generally held view with respect to pensions in 1933 and 1934 is that which should be looked to in ascertaining Congress' intent when it enacted the Securities Acts of 1933 and 1934. Hence, it is proper to construe "disposition for value" as the court below observed the SEC had first done when it "reasoned that there was no sale involved in a noncontributory plan because there was no direct investment of money by the employee, consistent with the then current legal view that employer's contributions were gifts." (A. 245). The SEC characterizes *its* original view as "outdated" and the argument that flows from it "unsound". Here it opts for a literal, bareboned construction of "sale" as if Congress had nothing whatever in mind except what could

be fit into its definition by changing modes of thought and strained but imaginative constructs (SEC Br. 81). Relying on the proposition that "employer's contributions are part of the total compensation paid in exchange for the employee's labor", it urges that the labor is the "value" and the giving of that labor, the employee's contribution (SEC Br. 82).[24] Both it and plaintiff then rely on two distinct court cases, *Collins* v. *Rukin*, 342 F. Supp. 1282 (D. Mass.) and *SEC* v. *Addison*, 194 F. Supp. 709 (N.D. Texas) as establishing that "value" for purposes of "sale" can consist of the "performance of service." (SEC Br. 77, n.61 and 86; Pl. Br. 89-90). A reading of the statute that finds "value" in the contexts of *Collins* and *Addison* is hardly free from doubt. But here again, in *this* case we are dealing with a context much removed from the contexts there. Neither case involved pensions, noncontributory or otherwise; both involved securities in rather conventional forms. While *Collins* arose in an employment context, the solicitation to purchase a security was beyond dispute; *Addison* did not deal specifically with an employer-employee relationship but rather with the widespread public sale of $1,000,000 of unregistered securities for a variety of considerations, including cash. To reason from such cases that Congress intended the giving of value element of "purchase" and "sale" to include working for an employer who makes contributions to a pension fund places more

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[24] Plaintiff goes one step further and argues that *SEC* v. *Harwyn Industries Corp.*, 326 F. Supp. 943 (S.D.N.Y.), establishes that the consideration for a "purchase" within the meaning of the securities laws need not come directly from the purchaser. Here again plaintiff treats not merely the words of the statute but also the words of cases construing the statute as if they are immutable, universal and applicable in all contexts. It should be sufficient to note that in *Harwyn*, the term "sale" was being construed in a context in which insistence on direct contribution would have permitted "circumvention of registration requirements by devious and sundry means" (*Id.* at 954).

weight on *Collins* and *Addison* than either can reasonably bear. *Cf. United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 127.

II. THE LEGISLATIVE AND ADMINISTRATIVE HISTORY OF THE SECURITIES LAWS SHOWS THAT THEY WERE NOT INTENDED TO COVER COMPULSORY NONCONTRIBUTORY PENSION PLANS.

A. *The 1971 SEC Institutional Investor Study*

We begin this reply to our adversaries' treatment of the historical materials by focusing on what they say in response to Judge Tone's observation:

> As late as 1971 in its *Institutional Investor Study* submitted to Congress in connection with the consideration of the ERISA legislation, the Commission's view was that although a non-contributory pension plan might well be an investment contract, the element of sale was lacking (A. 260-261).

The SEC says:

> In this regard, IBT relies * * * upon a statement in the Commission's Institutional Investor Study in an attempt to demonstrate that the Commission's "no sale" rationale applies to the antifraud as well as the registration provisions. But the statement to which IBT refers is only a recital of the fact that, as noted earlier * * * the Commission's staff had adopted the "no sale" rationale. The Institutional Investor Study specifically referred to the 1941 Assistant General Counsel's opinion, which, as we have seen * * * dealt with registration only. The Commission has *never* taken the position that there is no sale for the purposes of the antifraud provisions.[25]

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[25] SEC Br. 67, footnote and references to the briefs in this Court omitted, emphasis in original. Plaintiff's brief says nothing on this point.

This description of the Study cannot survive examination of its actual text. The sentence to which the citation of Mr. Davis' opinion [26] is appended reads:

> In the case of plans which are unfunded (pay-as-you-go basis plans) and in the case of plans where contributions to the funding medium consist of either employer money only or employee contributions which are required as a condition of employment, the Commission staff has taken the position that the Securities Act does not apply because there is no "sale" or "offer for sale" of a security.[27]

Moreover, in suggesting that our reliance on the Study is limited to the single "statement" (SEC Br. 67) quoted above, the SEC avoids confronting the other telling textual support of our analysis, for example, the lucidly presented distinction between the legal status of "(a) *Plans not providing for voluntary contributions*", which are governed by the "no-sale" interpretation of the statute, and "(b) *Plans providing for voluntary employee contributions*", which are subject to the "no-action" administrative practice, which was indeed confined to registration. (Study 996-997, see IBT Br. 59-60).

The concluding observation at SEC Br. 67 ("The Commission has *never* taken the position that there is no sale for the purposes of the antifraud provisions.") is at the very best hyperbole. In fact, it is acknowledged just four pages later that in its brief *amicus curiae* in *Leland Stanford* "the Commission stated that its "no sale" rationale for mergers applied to both the antifraud and the registration provisions" (SEC Br. 71, n.54). And the SEC's extravagant denial is further belied by the

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[26] While the Commission inadvertently miscites the opinion, it is referring to the second of two opinions by Assistant General Counsel John F. Davis at CCH Fed. Sec. L. Rep., 1941-1944 Dec. ¶ 75,195, p. 75,387; see IBT Br. 104.

[27] 3 SEC Institutional Investor Study 996 (1971).

other expressions of its views in the Study, 1941 Davis opinion, and the Purcell testimony, to refer only to material quoted herein, e.g., p. 27 *supra* and pp. 38-40, 47-49 *infra*. What, *never?*

The categorical assertions which the historic record *does* support are the following:

1) Until its brief to the Court of Appeals below in this case the Commission has *never* asserted the position that there is a "purchase and sale" for the purposes of the antifraud provisions of the securities laws, or otherwise, when an individual accepts or remains in employment covered by an involuntary noncontributory pension plan, and;

2) The Commission *never* exercised the authority which it first asserted on brief in the court below: it *never* regulated noncontributory involuntary pension plans under the antifraud provisions of the 1933 and 1934 Acts, either by rules, or interpretive guidelines, or enforcement proceedings.

B. *Rejection of the 1934 Hastings Amendment to the Definition of "Public Offering"*

The SEC acknowledges that the 1934 Hastings amendment to the 1933 Act, which was rejected by the Conference Committee, and Congress, "did not expressly refer to the type of pension plan involved in this case * * *" (SEC Br. 59). In fact, it did not refer to *any* "type of pension plan": the word "pension" did not appear in either the amendment itself, or any of the debates, or the Conference Report. That Report makes clear that the type of plan which was deemed to be encompassed by the amendment, and whose participants were needful of securities law protection was "employee stock investment plans" (H.R. Rep. No. 1838, 73rd Cong., 2d Sess. 41, hereinafter "Conference Report").

In straining, nevertheless, to extract some significance from Congress' action, the SEC eliminates all reference to "employee stock investment plans", first, by ending its quotation of the Hastings Amendment immediately before that phrase,[28] and then by beginning its quotation of the Conference Report immediately after that phrase. These truncated quotations are then joined by the words, "such plans" so as to make it appear that the Conference Report was dealing with "bona fide plan[s] for the payment of extra compensation".[29]

It is puzzling that the SEC should go to such lengths to lay the predicate for a claim which adds so little to its argument: "* * * the Conference Report demonstrates that the Congress was aware that compensation for employment may take the form of an investment and that, notwithstanding the special characteristics of the employer-employee relationship, employees as investors are in need of securities law protection." (SEC Br. 59). For even if this statement is accepted at face value, it asserts nothing about what Congress considered to be "an investment" and under what circumstances it considered an employee to be "an investor". That we learn from the Report itself, by its reference to "participants in employee stock-investment plans".

Plaintiff reads more into the Congressional action and likewise takes inexcusable liberties with the documentary record. Plaintiff argues that the Hastings amendment "would apply not only to stock-investment plans—as petitioners would so limit it—but also to employee plans for the payment of *extra compensation*, such as the more common employee pension plan designed to invest em-

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[28] Compare SEC Br. 58 with 78 Cong. Rec. 8708, quoted at IBT Br. 82.

[29] Compare SEC Br. 58-59 with Conference Report quoted at IBT Br. 92 and p. 31, *infra*.

ployee funds in a variety of different types of assets." (Pl. Br. 63, emphasis in original).[30] He follows this by purporting to recite what the Conference Report said; but because he, too, quotes only that portion thereof which follows "participants in employee stock-investment plans", his phrase "such plans" puts plaintiff's own position into the Conference Committee's mouth. (*Id.*)[31]

While plaintiff and the SEC both rely heavily on the phrase "extra compensation" in the amendment, their briefs offer no evidence of what Senator Hastings meant thereby. And while plaintiff stresses that Senator Hastings used the phrase "additional compensation" when he objected to the Conference's disapproval of his amendment (*id.*), the more complete version of what he said on that occasion, quoted at IBT Br. 93, suggests strongly that the Senator contemplated only plans whereby "employees of corporations * * * share in the profits of the corporation". Moreover, if any inconsistency can be perceived between Senator Hastings' statement on the Senate floor and the Conference Committee Report, it is the latter which is entitled to greater weight, as this Court held with respect to this very amendment in *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 126 n.13.[32]

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[30] It will be noted that even plaintiff's version, which refers to "employee funds", does not reach noncontributory pension plans, which are involved in this case.

[31] Plaintiff employed the same artifice *in haec verba* in his brief below (p. 34); although we demonstrated to the Court of Appeals how plaintiff had distorted the Report's text and meaning (Reply Br. 31-32, n. 56), the Court suspended disbelief and even adopted plaintiff's partial quotation of the Report. (A. 233)

[32] Indeed in that case, the Court described the 1934 amendment as one "which would have specifically exempted employee stock offerings" (*id.* at 126). Because the Court did not focus on the scope of the amendment, we do not rely on this statement as precedent. But we do think that in assessing the SEC's present

Plaintiff relies on the 1941 testimony of Commissioner Purcell (see IBT Br. 105-112 and pp. 41-49, *infra.*) to support his claim that in rejecting the Hastings Amendment, "Congress thus considered interests in employee pension plans as securities * * * and that the SEC so understood" (Pl. Br. 63). But in attributing this error to Mr. Purcell, the quotation from his testimony at Pl. Br. 63-64 omits (at the spot indicated by elisions) his reference to the Conference Report, and his quotation thereof, including, of course, its reference to "employee stock investment plans". What Mr. Purcell actually said, after quoting the amendment, was the following:

> My recollection, so far as that amendment is concerned, is that it was adopted in the Senate and went to conference. The proposal was eliminated by the conference committee, *and the report of the managers on the part of the House assigned the following reason for its elimination—and I quote from House Report No. 1838, Seventy-third Congress, second session, page 41:*
>
> *The conferees eliminated the third proposed amendment to this subsection on the ground that the participants in employees' stock-investment plans may be in as great need of the protection afforded by availability of information concerning the issuer for which they work as are most other members of the public.*

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position it is not without significance that in its brief in *Ralston Purina* it said:

> The Securities Act was amended in 1934. One proposed exemption, which was rejected, would have exempted participants in employees' stock investment plans. The reasons of the House conferees for rejecting this amendment are clear and unambiguous, as stated in their report of the conference:

It thereupon quoted the language from the Conference Report on that amendment in full. (Br. for Securities and Exchange Commission, No. 512, Oct. Term, 1952, pp. 26-27).

> With this clear statement of Congress before it, the Commission certainly had no alternative but to interpret the act as applying to employees' plans which involve the sale of a security.[33]

The upshot is, as we asserted at IBT Br. 92-94, that rejection of Hastings Amendment provides no "guidance" whatsoever in determining whether Congress considered private pension plans which do not involve employees' purchase of employer stock to be "securities".

C. *The Investment Company Act of 1940*

Plaintiff argues that the exclusion of employee pension trusts in § 3(c) (13) of the Investment Company Act of 1940 and the provision for discretionary administrative exemption of employees securities companies in § 6(b) of that Act are evidence that Congress there recognized similarities between employee pension plans and ordinary mutual funds. (Pl. Br. 79-81). Plaintiff contends that in the absence of the § 3(c) (13) exclusion, *all* pension plans would be regulated as investment companies under the 1940 Act, but neither of the statements on which he relies refers to "all" pension plans. Rather, they are carefully limited, in the case of Mr. Purcell's testimony, to "many" employee plans, and, in the case of the Assistant General Counsel's opinion, to "certain types" of pension and profit sharing plans. See pp. 38, 40-42, *infra.*

The history of § 3(c) (13) is inconsistent with plaintiff's interpretation. Section 3(c) (13) was not contained in the Wagner-Lea bill originally submitted to Congress in 1940, but was one of a group of exclusion provisions

[33] 1941 Hearings at 895-896, emphasis added to show the portion omitted at Pl. Br. 64. Plaintiff also substituted, without indication, a period for the comma after the phrase "the conference committee" thereby making it appear that the sentence ended there. (The full citation of the 1941 Hearings is given at IBT Br. 105).

later added to § 3(c) as part of an SEC-industry compromise.[34] The stated purpose of the additional exclusions was "* * * to make certain that there are eliminated those companies whose inclusion under the present bill was neither intended nor desired * * *",[35] as a "precaution to grant an exemption to every type of company which might be construed to be within the purview of the legislation but should not be within the legislation", and as "notice unequivocally to everybody in that category that they are not within the purview of the bill."[36] Thus, 3(c) (13) was designed, not as plaintiff suggests, to exclude what otherwise would have been covered under the Act, but for the opposite purpose of guarding against unintended application of the Act.[37]

[34] *Cf.* § 3(c) of S. 3580, the Wagner-Lea bill, reprinted in *Hearings before a Subcom. of the Com. on Banking & Currency on S. 3580,* 76th Cong., 3d Sess. 3 (1940) [hereinafter "*1940 Senate Hearings*"], with § 3(c) of the 1940 Act, 54 Stat. 789, 798-799; see also 1940 Senate Hearings, 1105-6.

[35] Framework of Proposed Investment Company Bill, Title I, Embodying Suggestions Resulting from Conferences Between Securities and Exchange Commission and Representatives of Investment Companies, Memorandum dated May 13, 1940, ¶ 2, reprinted in *Investment Trusts and Investment Companies,* Hearings Before a Subcom. of the Com. on Interstate and Foreign Commerce, 76th Congress, 3d Session, on H.R. 10065, p. 96 (the "*1940 House Hearings*").

[36] Testimony of David Schenker, Special Counsel for the Securities and Exchange Commission, 1940 Senate Hearings, 1110, 1111.

[37] This is not the only instance in which Congress specifically excluded or exempted transactions or entities from the federal securities laws even though they would not have been covered in the absence of exclusion or exemption. *See* Mr. Justice Brennan's discussion of the insurance exemption of § 3(a)(8) of the 1933 Act in his concurring opinion in *VALIC,* see 359 U.S. at 74, n. 4, where he pointed out that "Under the Securities Act, it would appear that in the case of the ordinary insurance policy, the exemption would be just confirmatory of the policy's noncoverage under the definition of security."

The addition of § 3(c)(13) may well have been prompted by a perception that *some* employee benefit plans resembled employees securities companies, which are investment companies and are recognized to be such in the SEC's comprehensive Investment Trust Study which was the basis of the 1940 Act.[38] Such a similarity might have been perceived in the case of voluntary contributory plans. But there is nothing to indicate that anyone then thought that compulsory noncontributory pension plans resembled employees securities companies or any other type of investment company. On the contrary, employee pension plans were not even mentioned in the Investment Trust Study. Such a perception would also have been in sharp conflict with the SEC's view in 1941 that the distinction between contributory and noncontributory pension plans was significant for purposes of deciding the desirable scope of regulation under the 1940 Act for an employees securities company which invested funds of a *noncontributory* pension plan. *Electrical Securities Corporation*, 10 SEC Jud. Dec. 648 (1941).[39] And the fact that § 3(c)(13) was

[38] *U.S.* v. *National Assn. Securities Dealers*, 422 U.S. 694, 705-706; see IBT Br. 98.

[39] Plaintiff misses the point of *Electrical Securities Corporation*, in which the SEC itself recognized that an employee pension trust and an employees securities company are different entities under the 1940 Act and that pension trusts are outside the purview of the Act. *Cf.* Pl. Br. 80. Plaintiff's reference to *General Electric S & S Program Mutual Fund* [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,630 adds nothing. That ruling (which plaintiff fails to note was ultimately reversed on other grounds by the SEC, [*id.* 1969-70 Transfer Binder, ¶ 77,750]) did not involve a pension plan but a mutual fund which was concededly an investment company required to register under the 1940 Act and which was one of several alternative media in which employees could direct the investment of their interests under a voluntary contributory thrift plan. This mutual fund, for which certain exemptions were sought under § 6(b), would have been excluded under § 3(c)(13) but for certain distribution provisions which were said to bar its qualification under the Internal Revenue Code. The most that can be drawn from that ruling for present purposes is that a voluntary

drawn broadly to exclude *all* qualified plans only reflects understandable caution, since an exclusion limited to voluntary contributory plans might have invited the inference that compulsory noncontributory plans were intended to be regulated.

Unlike the plaintiff, the SEC does not defend the inference which the Court of Appeals drew from the 1940 Act. Instead the SEC tries to explain the exclusion of qualified pension plans by suggesting that because such plans had not been required to register under the Securities Act it would have been anomalous to regulate them under the 1940 Act. SEC Br. 62-63. The premise of this argument, that exemption from registration under the 1933 Act was viewed as a reason for exclusion from the 1940 Act, contradicts what the SEC told Congress in 1940 and is inconsistent with the scheme of the 1940 Act.

In explaining the need for the 1940 legislation, SEC Commissioner Healy told Congress that the 1933 Act had proved inadequate to protect the interests of investors in investment companies, in part *because* most investment companies had *not* been required to register their securities under the 1933 or 1934 Acts. He testified:

> Finally, particularly with respect to those companies which have not registered their securities under the Securities Act of 1933 or the Securities and Exchange Act of 1934—*and only a small number have so registered their securities*—the investor has been un-

contributory employee *savings* plan may be an investment company and an employees securities company under the 1940 Act unless qualified under the tax law. That proposition provides no support whatever for the plaintiff's contention that the regulation of employees securities companies under the 1940 Act reflects a congressional perception that *all* employee *pension* plans are similar to ordinary mutual funds.

> able to obtain adequate information as to their operations.[40]

Moreover, many of the abuses at which the Act was directed were unrelated to the presence or absence of disclosure. Thus, it was not "anomalous", but entirely understandable, that Congress would subject investment companies to substantive regulation without regard to whether or not they were subject to the registration requirements of the 1933 Act.

> The Securities Act of 1933 and the Securities Exchange Act of 1934 have not acted as deterrents to the continuous occurrence of abuses in the organization and operation of investment companies. Generally these acts provide only for publicity. The record is clear that publicity alone is insufficient to eliminate malpractices in investment companies. *Further, the great majority of investment companies have never come within the purview of these acts.* (Emphasis added.)[41]

The SEC also attacks a straw man in observing that some entities excluded under § 3(c) of the 1940 Act are owned by investors. SEC Br. 62. But we have not suggested that there was any single rationale, such as the absence of an investor interest, for the various exclusions contained in § 3(c). Our argument rather is that the express statement in § 3(c)(13) that employee pension trusts are not investment companies, coupled with the express provision for regulation of employees securities companies, reflects a considered legislative determination that the relationships involved in employee pension plans were not appropriate subjects for the type of regulation provided in the 1940 Act. And this determination

[40] 1940 House Hearings 59 (emphasis added).

[41] H.R. Rep. 2639, 76th Cong., 3d Sess. 10 (1940); *see also* S. Rep. No. 1775, 76th Cong., 3d Sess. 11-12 (1940).

supports our contention that Congress has never regarded employee pension plan participants as investors intended to be protected under the federal securities laws.

Nor is the exception of unqualified plans from § 3(c)(13) inconsistent with our view, as SEC Br. 62 suggests. Since the reason for this limitation is not explained in the legislative history, it is rather futile to speculate what did and did not "make sense" (*id.*) to the 1940 Congress. For aught that appears, Congress simply took the view that since such plans were not entitled to protection under the Internal Revenue Code, they did not merit automatic exclusion from the Investment Company Act if, for other reasons, they satisfied the definition of an investment company in § 3(a). Congress may have thought that the line between plans which were and which were not investment companies was a hazy one, and did not wish to stop to consider the precise characteristics of plans which were not for exclusive benefit of employees and therefore unqualified.[42] In any event, in the absence of any evidence that the exception was given more than passing attention, there is no basis for drawing any inference inconsistent with the recognition, in the enactment of § 3(c)(13), that qualified employee pension trusts are not investment companies and, implicitly that participants are not "investors" intended to be protected by the federal securities laws.

D. *The 1941 Opinions*

Little is said on the other side which calls for amplification of our discussion (IBT Br. 103-105) of SEC Assistant General Counsel Davis' September 1941 opinions. It is argued at Pl. Br. 65 "that the Second Opinion makes it clear that an interest in an employee pension plan is a security". In so far as this assertion is made

[42] Internal Revenue Code of 1939, § 165.

to advance the proposition that interests in all kinds of pension plans involve securities, it simply disregards the qualification "interests in certain types of plans" in the very passage quoted. See also IBT Br. 103, n.93, 104. Thus, what the opinions do make "clear" is that the SEC regarded not all, but only "certain types of plans" to be within the definition of "investment contracts". The SEC does not meet this point at all; nor does it ever face up to this evidence of what its historic position on the scope of the term "security" really has been.

Both plaintiff and the SEC cite the Davis Opinions in support of the argument that the "no-sale" rationale with respect to compulsory plans and noncontributory plans applies only to the registration requirements and not to the antifraud provisions of the Act. (SEC Br. 66, Pl. Br. 64, 91-92). This argument too, depends on ignoring the text of the Opinions. While Mr. Davis referred frequently to the registration requirement, he did so because he was responding to inquires as to whether registration was necessary. But his *reasoning* was based on the statutory definition of the term "sale", see IBT Br. 104.

Referring to the Davis Opinions and to Mr. Purcell's 1941 testimony (see pp. 41-49 *infra*) plaintiff argues that "this no-sale theory was part and parcel of old Rule 133 and was *only* applied in the context of the registration requirements." (Pl. Br. 92, emphasis in original). Here plaintiff commits a not uncommon error against which then SEC Chairman Cohen cautioned in an address given concerning Rule 133. After explaining that the predecessor of Rule 133 was a Note to Form E-1 dealing with corporate reorganization and adopted in 1935, Mr. Cohen continued:

> Before dealing with certain events leading to this decision [to adopt Rule 133 in 1951], it is important to understand the distinction which must be drawn between the so-called "no-sale" *theory* and what is popularly referred to as the "no-sale" *rule*. The distinction is vital to an understanding of the entire problem.
>
> The Commission's briefs in the *Leland Stanford* case in 1941 and 1943 had urged two propositions upon the court: (1) the "no-sale" *theory*, that is, that the consolidation in that case did not involve a "sale" within the meaning of the definition of that term in Section 2(3) *for any purpose* under the Act; and (2) even though the Court might not agree with this proposition that the "no-sale" *rule* which was then embodied in the Note to Form E-1 was limited by its terms to questions as to the application of the registration provisions of the Act to the transactions of submission and consummation of mergers, consolidations and similar plans and, therefore, could properly be relied upon as making registration unnecessary. It was further expressly stated in these briefs that, while reliance on the "no-sale" registration *rule* in the Note afforded protection from civil liability under Section 12(1) of the Act because of failure to register, if the Court did not agree with the "no-sale" *theory*, the *rule* would provide no protection under Section 19 from the anti-fraud, civil and criminal liability provisions of Sections 12(2) and 17.
>
> The Court of Appeals decided the case on other grounds and then referred to the Commission's arguments in phraseology which, it is generally urged, suggests that the Court accepted the "no-sale" *theory*. Following this discussion, the distinctions between the *rule* and the *theory*, so ably argued in our briefs, and their implications apparently were not fully appreciated, or were glossed over.[43]

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[43] Cohen, ***Rule 133 of the Securities and Exchange Commission***, **14 Record of the City Bar Ass'n. of N.Y., 162, 164-165 (1959) (footnote omitted, emphasis in original).**

Assistant General Counsel Davis' opinions on pension and other employee benefit plans, of course, were not applying the "no-sale" *rule*. This is clear not only from his express reliance on the Act, but because the Note, which was the predecessor of Rule 133, dealt only with mergers and consolidations. Thus, his reasoning applied to the antifraud provisions as well.[44]

E. *The 1941 House Hearings*

Our adversaries place heavy reliance throughout their brief on their interpretation of Commissioner Purcell's testimony as the SEC's spokesman at the 1941 House Hearings. They assert that he there took the position that interests in all pension plans were securities, and that involuntary noncontributory pension plans were exempt from the registration requirements of the Securities Act but were subject to its antifraud provisions. They are wrong in both respects.

1. In specifically addressing the statutory definition of "security", Mr. Purcell said that

> any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an "investment contract." (1941 Hearings 895).

Yet plaintiff argues:

[44] SEC's brief, 71-72, n.54, acknowledges that in its *Leland Stanford* brief it took the position that the definition of "sale" excluded the transaction from the antifraud as well as the registration provisions. That the *Leland Stanford* case involved *mergers* and that the SEC later changed its position with respect to mergers, does not detract from the significance of that brief in demonstrating what the Commission meant in 1941 when it described the consequence of finding that there was "no sale" for the purpose of the Act. Later in the footnote, the Commission attempts to confuse its "no sale" theory with its "no sale" rule, connecting the two only with the word "Indeed"; but the Commission knows full well the difference.

> In making this statement Commissioner Purcell has in no way limited his remarks to any particular type of pension plan. Daniel has been given the opportunity to place his earnings in the Local 705 Pension Fund, to be invested for his benefit and returned to him in the future. The fact that his compensation is placed in the Fund direct by his employer is a quirk of the tax code and is not in derogation of his rights under the federal securities laws. (Pl. Br. 67).

We do not think that the words Mr. Purcell used could have born the meaning plaintiff ascribes to them; for example "returned to them" unmistakably referred to a characteristic unique to contributory plans. But the major error of plaintiff's interpretation is that Mr. Purcell's words can be read to refer to noncontributory or involuntary plans if at all, only by attributing to him views concerning such plans which are demonstrably contrary to Mr. Purcell's actual views when he testified.

Since he considered noncontributory plans to be a "gift" he could not have included them among plans in which employees place "a part of their *earnings*." [45] So, too, he would not have used phrases such as "given the opportunity to place part of their earnings in a fund which is to be invested" (*id.* at 895); "opportunity to inform himself of the essential terms of the plan before he invests in it" (*id.* at 902) and "when he [the employee] is asked to participate in the plan" (*id.* at 903) in describing an involuntary plan. For the SEC believed, in Mr. Purcell's words, that participation in an involuntary plan involved no choice on the employee's part; contrary to our adversaries' present views, Mr. Purcell believed that "as a practical matter, people do not decide, it seems to

[45] See also *e.g., id.* at 896 ("employee's payments"); *id.* at 902 ("his funds"); *id.* ("his contributions"); *id.* at 903 ("the employee's money").

me, to take jobs or leave them because they like or dislike the company's investment plan" (*id.* at 897).

Whatever may be said on the merits of these matters, it is fallacious to interpret Purcell's testimony in the perspective of plaintiff's and the SEC's present position; his words can be correctly understood only if approached on the basis of his own assumptions as there expressed.

2. Our adversaries simply ignore the words of limitation which Mr. Purcell used, such as "Certain" (1941 Hearings at 887) "many" (*id.* at 895), etc., and the other evidence discussed at IBT Br. 106-109, that the only type of employee plan he claimed to be within the statutory definition were voluntary contributory plans, that is, those in which employees were invited to put their money into a fund which would purchase employer stock or other securities. The very language quoted at SEC Br. 55 shows what type of plan Mr. Purcell was talking about.[46]

And, of course, our adversaries can point to no evidence that Mr. Purcell embraced the notion which they

[46] Likewise misplaced is plaintiff's reliance on the SEC's prior written Report on its proposals, and other proposed amendments to the Act:

> Although the Commission believes that in general employees' plans are highly desirable, it believes also that *there are many plans* as to which employees are entitled to assurance that there will be disclosed to them the essential facts concerning *their payments*, how those payments will be invested, and the conditions upon which they will be returned . . . Pl. Br. 66, (quoting 1941 SEC Report p. 15, our emphasis).

The subsequent reference in the portion of the 1941 Report quoted at Pl. Br. 66 to "employee-investors", when understood in relation to the SEC's view that participations in noncontributory pension plans were "gifts", confirms that the amendment proposals discussed in the 1941 SEC Report related to contributory plans only. So too, the use of that phrase in the Davis opinions relied on at Pl. Br. 24-25, is shown by the context to refer only to employees who put money into voluntary contributory plans.

advance, that a plan where the benefits depend primarily on employer contributions based on the labor of individuals who will never qualify for a pension, constitutes an "investment contract".

With the text unavailing, the SEC resorts to unwarranted inference. It asserts that if "the Commission had regarded interests in noncontributory, compulsory pension plans as not being securities, there would have been no need to address the issue of whether a sale was involved" and that it is therefore "clear" that Commissioner Purcell regarded as securities "not only interests in voluntary, contributory plans but also interest in involuntary, noncontributory plans, like the Local 705 plan." (SEC Br. 57) This argument is untenable. Application of the Act requires the presence of both a security and a sale. It is entirely reasonable for the agency to formulate a position with respect to both statutory elements. But it is not necessary for the Commission to reach the same stage of its thinking with respect to both at the same time, or, having determined that one essential element of statutory coverage is lacking with respect to a particular type of a transaction speculate as to whether the other element is also present. Mr. Purcell's testimony in its entirety shows that the Commission had reached the point where it believed that some pension plans and other employee pension plans involved securities, that it recognized that some were not, and that it had not yet determined just where the line fell.[47] It was

[47] Mr. Purcell clearly did not make the statement attributed him at Pl. Br. 63 that after Congress rejected the 1934 amendment proposal the SEC considered the federal securities laws applicable to all employee pension plans. We have shown in our discussion of that proposal at pp. 31-32, *supra*, that plaintiff arrives at this invention by omitting in his quotation of Mr. Purcell's testimony the key sentences indicating that the subject of that amendment proposal was employee stock investment plans and by ignoring the fact that nowhere in the history of the rejected 1934 amendment is there any reference to employee pension plans.

unnecessary for the Commission to so determine because it had concluded that there was a "sale" only with respect to voluntary contributory plans. In presenting the SEC's position to Congress Mr. Purcell stated what the agency had already decided, while preserving its options with respect to the precise scope of "security". Moreover, on this occasion Mr. Purcell did feel the "need" to disarm a skeptical committee by stressing the limitations of the SEC's jurisdictional claims under both the key terms, "security" and "sale". That is why he sought "to make as clear as possible at the outset of my remarks * * *" what the SEC was, and was not proposing, and at one point to give assurance that "that is all that is suggested." (1941 Hearings at 887-888, 903 quoted at IBT Br. 107-108)

3. Both plaintiff (Pl. Br. 65-66) and the SEC (SEC Br. 55-56) seek to convey the impression that Mr. Purcell's testimony at pp. 895-897 of the 1941 Hearings was addressed to Congressman Paddock's proposed amendment to the definition of "security" in Section 2(1) of the 1933 Act. For example, after quoting that amendment, the SEC continues (SEC Br. 55):

> Commissioner Purcell, testifying before the Congress concerning this amendment,[41] articulated the Commission's view that interests in pension funds are securities, since a pension fund is simply another investment vehicle through which the funds of individuals are managed.
>
> [41] *Id.* at 887-920.

We submit that Mr. Purcell did not articulate that view, let alone the foregoing explanation thereof, indeed, the very passage quoted does not even mention pension plans. But our immediate point is that the SEC's footnote reference is to Mr. Purcell's entire testimony on this subject (except for his introduction of Mr. Latimer,

1941 Hearings at 865). In fact, however, when Mr. Purcell gave the testimony quoted at SEC Br. 55, (from p. 895 of the Hearings), he was testifying only about the *Commission's* proposal, as the introduction to his testimony on this subject should suffice to make clear. (1941 Hearings at 887-888, quoted at p. 44, *supra*).[48] He did not address the Paddock amendment until page 919 of the Hearings where he said:

> I should like to comment now on the bill H.R. 6065, which is the bill introduced by Congressman Paddock on June 16 of this year.

Thus, it is not "petitioners and supporting *amici*" but our adversaries who "attempt to turn Commissioner Purcell's testimony on its head." (SEC Br. 55).

It is asserted at Pl.Br. 65: "Of course, had Congress never intended pension plans to come within the definition of 'security,' this proposed bill would have been unnecessary." What made the amendment "necessary" in the eyes of Mr. Paddock and others, was that the SEC had begun to press for registration of certain voluntary contributory plans. See IBT Br. 105-106, n.94.[49] The amendment did not indicate that its sponsor entertained, or attributed to the SEC, the view that involuntary plans were within the definition of "security". Once Mr. Paddock determined to prevent that result, it was prudent that he draft the exclusion broadly enough to cover all types of pension plans, including those as to which no jurisdictional claim had been raised lest the agency argue in the future by negative implication (although contrary to good sense) that it was permitted to treat compulsory or noncontributory plans as "securities". In testifying

[48] See also *e.g.*, the succinct statement of the SEC's concerns, *id.* at 901-902, and the description of its proposal, *id.* at 907-908.

[49] See also the testimony of industry witnesses cited at IBT Br. 109, n. 96.

about the SEC's own proposal, Mr. Purcell had made clear to the Committee its position that interests in voluntary contributory plans were "securities" and that the acquisition of interests therein involved a "sale," but that compliance with the registration requirements of the Act should be excused if certain conditions were met (*id.* at 907-908). He opposed the Paddock amendment because the conditions which it would have imposed were inadequate; for instance, he objected that § 165 of the I.R.C. fell short of the protection which the SEC deemed desirable for such plans:

> * * * [It] contains no requirement that the employer contribute anything whatever to the plan. There is no limitation on how the funds may be invested; a plan meeting the requirements of section 165 could involve *employees' savings* in the wildest sort of speculation. Nor is there any guaranty against forfeiture of *employees' contributions*, or any ready provision for making available to them the essential terms of the plan. (1941 Hearings 919-920, emphasis added.)

He also described the even greater inadequacies of § 21 (2) of the Banking Act, compliance with which would have excluded employees' savings account plans from the definition of "security" (*id.* at 920). He concluded his objections to the Paddock amendment with a paragraph that says nothing about what the SEC thought "security" means. What he did say was that if all employee plans were excluded from the definition of "securities", none would be subject to the antifraud provisions of the Act. (*id.*, quoted at SEC Br. 75).[50] He did not assert the proposition attributed to him at Pl. Br. 65-66 and perhaps at SEC Br. 74 that all pension plans are securities.[51] And his prior testimony is inconsistent with our adversaries' thesis that the "no-sale" theory is limited to the registration requirements of the Act, as we next show.

4. Mr. Purcell stated that in order for the Act to apply there must also be a "sale" and he nowhere stated that there would be a "sale" for some purposes and not for others. (1941 Hearings at 896-897 quoted at IBT Br. 108-109)

On the contrary, in explaining that registration was not required "where the employees pay nothing for the securities", he explicitly stated, "a gift is not a sale and the *Securities Act* is concerned only with sales of securities" (1941 Hearings 896, emphasis added). Our adversaries simply fail to do business with the underscored language, which bespeaks reliance on a statutory term on which coverage depends rather than some special characteristic of registration.

Nothing as explicit appears in Mr. Purcell's description of the "no-sale" theory with respect to compulsory plans. But the fact that he there specifically referred to the purposes of registration does not justify the contention that he was there using "sale" in a special sense limited to registration. And while *SEC* v. *National Securities Inc.*, 393 U.S. 453, on which our adversaries rely, held that the term "sale" *may* have different meanings for purposes of the registration and the antifraud

[50] In the original, the paragraph begins "In the second place" (1941 Hearings 920); as we have seen, what was said in the first place provides the context for the statement quoted by the SEC.

[51] Mr. Purcell plainly did not say anything about "exempting [securities] from the anti-fraud provisions" (SEC Br. 74); his objection was that the amendment "would actually *exclude* the specified types of interests or instruments from the definition of the term "security." (*id.* 1941 Hearings at 920, emphasis added). In fact, at that point in his testimony, he did not discuss the meaning of "sale" at all. The distinction between statutory exclusion, and statutory or administrative exemptions is sometimes important, but is not always scrupulously observed, as we show at IBT Br. 99, text and notes at nn. 91, 92.

provisions (pp. 18-20, *supra*), there is no evidence in Mr. Purcell's testimony that he was ascribing more than one meaning to the statutory term. On the contrary, the contemporaneous Davis opinion and *Leland Stanford* briefs confirm our view that the SEC believed that the volitional element of a "sale" was applicable to the antifraud provisions of the Act. (See IBT Br. 103-105, 110, n.97 and pp. 27, 38-39 *supra*). Indeed, that was still the SEC's view in the 1971 Institutional Investor Study (see p. 27 *supra*).

5. One further observation is called for with respect to Mr. Purcell's testimony and the interpretation placed on it herein by plaintiff and the SEC. Whatever room for debate there may be regarding that testimony, two propositions are incontrovertible:

1) Mr. Purcell never said that all pension plans (or all involuntary noncontributory pension plans) were securities;

2) Mr. Purcell never said that the antifraud provisions of the Securities Act apply to involuntary noncontributory pension plans.

Considering the skepticism and even hostility which several members of the Committee expressed concerning the Commission's assertion of any jurisdiction over pension plans, elementary candor would have called for a clear statement to that effect had the SEC then taken the positions now attributed to it. Far from saying any such thing, Mr. Purcell took pains to emphasize the modesty of the Commission's position, see p. 44 *supra*.[52] Given

[52] See also 1941 Hearings at 904.

Mr. WOLVERTON. Now, assuming that to be the real reason that prompts you in making the suggestion of this change in the law, does it not seem to you that it is a question foreign to the fundamental purpose of the Securities Act?

[Continued on page 49]

these disclaimers, it is unfitting, to say the least, for his successors to invoke his testimony in support of their novel and sweeping jurisdictional pretensions.

F. *The SEC's Post-1941 Administrative Practice*

The briefs on the other side simply ignore the history of the SEC's administrative practice recited at IBT Br. 112-116.

G. *The 1970 Amendment to § 3(a)(2) of the 1933 Act*

In its brief in the Court of Appeals, the SEC placed heavy reliance on its reading of the legislative history of the 1970 amendment to § 3(a)(2) of the 1933 Act, an interpretation which it persuaded the Court of Appeals to adopt. In this Court, however, the SEC concedes that the legislative history of that amendment "is not a model of clarity." SEC Br. 61. We think that even this fully justified retreat from the certitude displayed in the SEC's brief to the Court of Appeals on this point fails adequately to acknowledge the flaws in the court's reasoning, which the SEC's brief simply adopts. But even on its face the SEC's acknowledgement that the legislative history of the 1970 amendment "is not a model of clarity", is an unwitting confession that the Court of Appeals erred in attaching significance to the enactment of that amendment. Our point is simply that the

[52] [Continued]

Commissioner PURCELL. Well, I must remind you again, Congressman, you must keep this clear, our suggestion is for exemption and not for inclusion in the act.

Mr. WOLVERTON. I am perfectly aware of the adroitness that can be readily discerned in the presentation of an exemption which in fact establishes a basis of control as to other cases.

Commissioner PURCELL. May I say, for the Commission, that that is not our intention in submitting this proposal, Mr. Congressman.

fact that Congress amended § 3(a)(2) of the 1933 Act, and specifically that it added to that amendment in the course of its passage the words "single or", provides no support for the conclusion that "Congress has evidenced agreement with the SEC's position that interests in pension funds are securities". (A. 236) No Congressional Committee, no individual Congressman ever espoused such a view or even stated that, as the court below held, the amendment deals with the sale to employees of interests in pension funds. (A. 238) We submit that it is a hazardous, if not desperate undertaking to impute to Congress any views concerning the legal status of employee interests or participations in pension funds on a legislative record which does not reveal with "clarity" even that Congress had consciously considered the subject.

The SEC nevertheless adopts the Court of Appeals' conclusions regarding the 1970 amendment, without any effort to respond to our detailed analysis of its error. (IBT Br. 116-135.) Instead of discussing the language of the amendment and its legislative history, the SEC offers the contention, also advanced by plaintiff, "that [i]n the case of a single pension trust fund maintained by a bank there is only one security—the employee's interest in that fund," a premise from which it leaps to the conclusion that if § 3(a)(2) did not apply to employee interests the addition of "single or" would serve no purpose. (SEC Br. 61, n.48, see also Pl. Br. 75). This line of argument is at best a conjecture which would not justify attributing significance to the House Committee's addiion of the words "single or", even if the legislative record were otherwise silent.[53] Indeed, the SEC's very statement of the argument assumes the ultimate proposition for which our adversaries contend,

[53] "The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61

namely that Congress considered an employee's interest or participation in a pension fund to be a security. Moreover, the premise of the argument overlooks the relationship between the bank and the plan administrators whereby the bank agrees to provide investment (and perhaps other) services for the fund. Congress may well have considered that agreement to be an "investment contract", or at least that it might some day be argued to be one. This hypothesis is at least consistent with the thrust of § 27(b), namely to regulate the relationship between banks and insurance companies on the one hand and various types of plans on the other, and does not attribute to Congress an undisclosed shift in focus from that relationship to the one between pension plans and their participants (see A. 238). Alternatively, it may be that the House Committee believed, without considering the matter further, that if no reference to "single" funds were made it might be contended in the future, by a process of negative implication, that only collective bank funds would be exempt from registration, and added the phrase "single or" as a precaution.[54] There is some evidence to support that assumption too, for the Stannard Dunn letter raised this very point.[55] While we be-

[54] Since banks generally offer such services to a multiplicity of offerees, this was not an idle concern. *See SEC* v. *Ralston Purina*, 346 U.S. 119, 125.

[55] This change may have been prompted by the observations in the second paragraph of the Stannard Dunn letter which drew attention to the existence of separate, non-commingled trust funds maintained by banks and the absence of any reference to bank trust funds of that type in the bill approved by the Senate. IBT Br. 127-128, n. 114. However, the addition of "single or" clearly had no relation to the change suggested in the fourth and fifth paragraphs of Mr. Dunn's letter which the Court of Appeals quoted at A. 239. See IBT Br. 127-128, n.114. In response to our showing, it is contended at Pl. Br. 76, n.64 that the Committee's failure to adopt Mr. Dunn's proposed language is "unimportant" and that "single or" had the same "effect" as Dunn's language. But, Mr. Dunn had sought to exempt interests in all tax qualified pension plans while the Springer-Moss

lieve that both of our hypotheses are more plausible than our adversaries' conjecture, for which no evidence at all is proferred, our principal objection to their argument is that any speculation on this subject is wholly unwarranted, first, because, as already noted, significance should not be attributed to Congress' action by conjecture, and second because the language of the amendment and the legislative record provide objective evidence which shows what Congress did intend and refutes the conclusion which our adversaries would merely divine.

The SEC does not agree with the Court of Appeals concerning the circumstances under which interests acquired by employees in pension funds would be exempted from registration. According to the SEC, in the phrase "a single or collective trust fund maintained by a bank", the words "maintained by a bank" modify "collective trust fund" but not "single." (SEC Br. 97, n.81.)[56] Under this reading, which is offered *ex cathedra*, with no sup-

colloquy demonstrates that the House amendment was limited to plans which were bank-maintained, see p. 53, *infra*, and plaintiff himself elsewhere agrees that it was so limited, Pl. Br. 74-75.

In short, although the evidence of the Dunn episode is entirely consistent with our interpretation of the House Committee's action, the soundest view of the matter is that expressed in the brief tendered by the United States, p. 28, n.12, that this letter, having been received without comment or cross examination, is entitled to little weight, citing *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31 and n.20. This observation is all the more apt because there are far more reliable materials, which show what the House Committee did and did not intend by adding "single or".

[56] The SEC's staff has recently taken the position which is consistent with the views it expressed here and to the court below, i.e., that a single trust fund does not have to be maintained by a bank in order to enjoy the exemption from registration afforded by § 3(a)(2). *Gilbert Associates, Inc.*, CCH Fed. Sec. L. Rep. ¶ 81, 406 (October 31, 1977). However, at an earlier time, the staff's position was that a single employer fund was not entitled to the § 3(a)(2) exemption when a bank, albeit a trustee, did not possess sufficient investment discretion. *Monolithic Memories, Inc.*, April 16, 1974 (available 5-16-74).

porting analysis or authority, all single pension trust funds which are qualified under the Internal Revenue Code are exempted from registration by the 1970 amendment, whether or not they are maintained by a bank. The SEC's reading does obvious violence to the language of the amendment. The phrase "maintained by a bank" clearly modifies and limits "single" as well as "collective trust fund." The SEC's reading is also contradicted by the Springer-Moss colloquy explaining the addition of "single or," where the subject of that change is authoritatively described as "interests in a single trust maintained by a bank where the trust assets were not commingled with those of other qualified trusts."[57]

Plaintiff reads the statute differently than the SEC. He asserts that "if an employee pension trust fund is maintained at a bank, the interests in such a fund are securities which are exempt from registration." Plaintiff simply substitutes "at" for the statutory "by", a transparent effort to support his positions that most pension funds would thereby be exempted from registration and that the focus of the amendment is interests in underlying pension trust funds rather than the subject clearly described in the statute, "trust fund[s] maintained by a bank." Further, plaintiff confuses trust funds maintained by banks in connection with qualified pension plans with bank common trust funds and H.R. 10 self-employed retirement funds, each of which is dealt with in other clauses of the 1970 amendment. Pl. Br. 72-73.

Plaintiff next argues that the language of the 1970 amendment itself describes the interests of participants in employee pension plans, Pl. Br. 73, but the argument is supported only by the device of quoting portions of the amendment with the crucial words "maintained by a bank" omitted.

[57] The entire colloquy is quoted at IBT Br. 126-127.

Plaintiff observes that "Petitioners at great length delve into the legislative history of the insertion of the phrase 'single or' into amended Section 3(a)(2)." Pl. Br. 75. We have done so, of course, because the Court of Appeals, following the argument of the SEC, expressed the view that it was that phrase which "altered the focus of the exemption to encompass interests in the underlying funds" (A. 239) and it is for that reason that we have stressed the Springer-Moss colloquy, which is the only explanation given for that change between the House and the Senate bill, and declared it to affect the provision only "slightly." Neither the Court of Appeals in its decision, nor our adversaries' briefs have attempted to reconcile Mr. Moss' representation on the floor of the House with the theory that the whole "focus" of the bill was thereby altered. Plaintiff argues that "no recourse to colloquy on the floor of the House is needed to confirm [plaintiff's] interpretation of Section 3(a)(2)" because of language at p. 10 of the House Report. Pl. Br. 77. But that language does not purport to explain the change made in § 27(b) of the bill. Indeed, it does not deal with single funds at all, since it is in a paragraph that begins:

> The reported bill also deals with the question of the Federal regulation which should apply to bank collective trust funds and insurance company separate accounts for corporate pension plans and for 'Smathers-Keogh' plans (commonly referred to as H.R. 10 plans).[58]

The discussion appears in the introductory portion of the report under the general heading "BANKING & INSURANCE."[59] The section-by-section analysis appears later,[60]

[58] H.R. Rep., No. 91-1382, 91st Cong., 2nd Sess. 10.

[59] *Id.* at 7.

[60] *Id.* at 43-44.

and with respect to § 27(b) it is identical to the Senate Report before "single or" was added (see IBT Br. 126, text and note at n. 112).

Plaintiff describes the Springer-Moss colloquy inaccurately when he says that it merely restates the § 3 (a)(2) exemption for single trusts and confirms that the amendment codified the SEC administrative practice which required registration of contributory employee pension plans where employee contributions were used to purchase securities issued by the employer. Pl. Br. 77, n.67.[61] The first part of the colloquy, which says what the amendment did do, explains the "slight" change with respect to "single trust[s] maintained by a bank." What Congressman Springer actually said in the second part of the colloquy was that in exempting interests in trust funds maintained by banks, the bill "would not prevent the SEC from requiring registration of interests and participations in such trusts", *"where employee money was used to buy securities of the employer"*. (Our emphasis). At this point he was explaining what the bill did not do. And in referring to that SEC administrative practice he did not say that the bill would codify it but only that the bill would not interfere with it.

It is not petitioners who have placed great reliance on the 1970 amendment. *Cf.* Pl. Br. 72. It is the plaintiff and the Court of Appeals, supported below by the SEC, who have relied heavily on their interpretation of that amendment and its legislative history which the SEC now dismisses as "not a model of clarity." It is from that interpretation that they draw inferences crucial to their

[61] Plaintiff also cites the second paragraph of the Conference Report as evidence that the amendment codified this administrative practice, Pl. Br. 77, n.66, but he omits the first paragraph of the Conference Report quoted in full at IBT Br. 129 which shows that the subject of the amendment was trust funds maintained by a bank.

conclusions that Congress has recognized that interests in employee pension plans are securities, that most such plans are exempt from registration and that the anti-fraud provisions of the securities laws can therefore be applied without creating widespread liability for the general failure of such plans to register under the 1933 Act. The conclusion is inescapable, however, that the amendment does not support any of these inferences, and we reiterate that the 1970 amendment has nothing to do with this case.

III. IN ENACTING THE WPPDA AND ERISA CONGRESS ACTED ON ITS UNDERSTANDING THAT THE SECURITIES LAWS WERE INAPPLICABLE.

In our opening brief we demonstrated at length (IBT Br. 67-78) that when Congress, in the WPPDA and again in ERISA, enacted legislation which dealt with the precise problem of the nature and timing of disclosure to pension plan participants and beneficiaries; it did so on the clearly expressed understanding that it was filling a regulatory vacuum, and that the SEC and its representatives on both occasions contributed significantly to that understanding. The court below interpreted the SEC's statements on those occasions as merely "advocat[ing] a hands-off approach to the regulation of pension plans with respect to disclosure requirements * * *" (A. 252-254); the evidence shows that that interpretation was inaccurate, see IBT Br. 78-79. Neither the SEC nor plaintiff defends the Court of Appeals' reading. Indeed, in commenting on what Congress understood "in its consideration of labor legislation" (SEC Br. 68)—that is, WPPDA and ERISA, which curiously are not mentioned by name—the SEC's brief does not even acknowledge that its representatives testified, or that it otherwise participated, when this legislation was under consideration. The brief refers only to "certain Congressional materials", a bland generality

which apparently refers to the Committee reports which commented on the legal status of pension plans.[62]

Instead, the SEC asserts first, that if Congress believed that "the anti-fraud provisions of the securities laws were inapplicable to interests in pension funds", it did so on the ground that there was "no sale" rather than on the ground that there was no "security" (SEC Br. 68), and alternatively that, "the Congressional materials do not demonstrate that Congress regarded the antitfraud provisions as being inapplicable" (*id.*). The first of these speculations need not detain us because it is irrelevant;[63] and the second is demonstrably incorrect. Contrary to the SEC's argument, the "Congressional materials" cannot "indicate that Congress was aware of the 'no sale' rationale" because they contain no reference whatsoever to that rationale, let alone to the Commission's present misleading characterization thereof as limited to registration (SEC Br. 68).

The further surmise that it is likely that Congress "never thought about [the antifraud provisions] and was unconcerned about them," (*id.*) is based on a misstatement of both "the nature of those provisions" and the "type of labor-management and pension legislation that

[62] These are the 1956 Reports (cited in full at IBT Br. 69); the 1972 Interim Report (S. Rep. 92-634, 92d Cong. 2d Sess.), and the 1973 Reports in both houses (cited at IBT Br. 73, n.61) which carried forward the Interim Report's summary of "The Existing Law".

[63] Our point is that "in both instances [the Congressional committees] legislated in light of their clearly expressed belief that the federal securities laws are inapplicable to [the] relationship [between private pension plans and their participants]." (IBT Br. 68). For that purpose it matters not whether they thought that the securities laws (and the countless other inapplicable laws) did not deal with the subject for one reason rather than some other reason. The Congressional committees had more practical and important concerns than to delve into the theory of *why* any or all of the other federal laws were inapplicable.

the Congress was considering at that time" (*id.*). It also disregards what the "Congressional materials" actually said and the purpose of the Committee's investigation and discussion of existing law.

While it is true that ERISA involves, "among other things, detailed and complex regulation of pension funds * * *" (SEC Br. 68-69), the same cannot be said about the WPPDA, which was a *Disclosure* Act, and left substantive regulation of welfare and pension plans almost entirely to the states. *Malone* v. *White Motor Corp.*, 435 U.S. 497, 507, 511-512.[64] And while ERISA federal-

[64] The description of the WPPDA at Pl. Br. 99-100 likewise ignores *Malone*; the characterization of the SEC's comments (Pl. Br. 100) is also wrong. Mr. Woodside, (the Director of the SEC's Division of Corporate Finance) testified that *some* pension plans had *registered*, not, that *all* had been exempted from registration.

> Now there have been a few pension funds which have registered under the Securities Act for the sale of securities to the employees of the company—there are very few of them. More frequently they have registered under the Securities Act plans involving the sale of the securities of the employer to the employee.
>
> Those plans most frequently take the form of either a stock-purchase plan, or perhaps a stock-option plan. The plan has certain pension fund characteristics in the sense that it is set up for the purpose of providing benefits for the employee at a future date, either upon retirement or upon separation from service from the company. The employer makes a contribution, ordinarily either in stock or cash. The employee makes a contribution, and the funds collected from the two are used to buy securities of the employer corporation or its subsidiaries.

(Welfare and Pension Plans Investigation, Hearings Before the Subcommittee on Welfare and Pension Funds of the Committee on Labor and Public Welfare, U.S. Senate, 84th Cong., 1st Sess. (1955), p. 944). In fact, Mr. Woodside engaged in a colloquy with Senator Douglas which shows both that disclosure to plan participants was at the heart of the Senate Committee's investigation, and that the SEC understood the laws which it administers were only remotely related:

> Senator DOUGLAS. The whole theory of the Securities and Exchange Act is primarily that the investor in securities should be furnished with accurate information about what he is purchasing, isn't that true?
>
> Mr. WOODSIDE. That is right.
>
> Senator DOUGLAS. So you carry the principle of disclosure into the purchase of securities. I wonder if there are any principles of disclosure which you think might be carried over from that field to the management of pension and welfare funds?
>
> Mr. WOODSIDE. Senator, I don't know that I am competent to talk about what should be done with pension or welfare funds, or what disclosures should be or might be required of them. I think perhaps the closest thing we have to that sort of a situation is found under the Investment Company Act, which the Commission administers, where you have large aggregations of capital arising from the sale of redeemable shares to the public, and those funds, which are in effect trust funds, are administered by the management of the investment company, and the act places certain limitations upon what can be done with them and how the fund may be operated with respect to inside dealing. (*id.* at 945).

See also the subsequent colloquy between Senator Allott and Mr. Woodside:

> Senator ALLOTT. It is really an accident you are in it at all since you have no primary concern in it as certain other departments might—for example, the Internal Revenue Service.
>
> Mr. WOODSIDE. I think that is correct. As I understood it, what was really wanted of us was an explanation of how our disclosure provisions operate with respect to certain other areas, and also some discussion of the way in which our acts affect those situations where a security is offered in connection with the plan. (*id.* at 946-947).

This colloquy appears immediately after that between the Senator and Commissioner Goodwin quoted at IBT Br. 69.

ized pension plan regulation, it also revised and significantly enlarged WPPDA's disclosure requirements. Thus, even if "the Congressional committees and their Staffs [who] commented on the absence at that time of adequate federal legislation," had limited themselves to "the absence of the type of legislation that they were contemplating," (SEC Br. 69) their comments would have at the very least meant that there was no "adequate federal legislation" providing for disclosure of information

of pension plans to plan participants. They would therefore have included among the laws that were *inapplicable* not only those referred to at SEC Br. 69 but also the "securities laws' antifraud provisions" which, far from being "essentially a prohibition of fraudulent activity", (*id.*) frequently compel affirmative disclosures, in securities transactions, see pp. 61-63, *infra*.

The most effective antidote to the SEC's speculations, however, is the text of "Congressional materials" themselves, for these reveal that the Committees' inquiries were into the entire legislative environment of pension plans, in accordance with the Committees' objective to determine what legal protections plan participants then enjoyed, in order to determine what new legislation was necessary and to assure that any legislation which was ultimately enacted would not conflict with, or create unnecessary burdens because of other existing legislation. The Committees thereupon concluded that only § 302 of the Labor Management Relations Act of 1947 and the Internal Revenue Code, and (in the 1972 Report) the WPPDA also, protected the rights of the beneficiaries of welfare and pension plans, see IBT Br. 70, 72, 74. The SEC's argument also cannot be reconciled with the Interim Report's discussion of the SEC's peripheral role, (quoted in full at IBT Br. 73-74, n.63).

Above all, while the Committee Reports themselves refute the SEC's contention, they are far from the only evidence that Congress enacted the WPPDA and ERISA in the belief that the securities laws, including their antifraud provisions, were inapplicable. Of particular importance, of course, is what the legislative history shows about the SEC's own participation in Congress' deliberations. IBT Br. 68-71, 75-77. The SEC does not confront this evidence at all, let alone attempt to reconcile its present assertion of securities laws jurisdiction with the representations of its highest officials when the 1958 and 1974 pension laws were under consideration.

IV. AFFIRMANCE OF THE JUDGMENT BELOW WOULD UNDERMINE THE POLICY JUDGMENTS MADE BY CONGRESS IN ENACTING PENSION LEGISLATION.

A. The Court may be surprised to see the Securities and Exchange Commission ("SEC") argue that for over forty years it has possessed the power to root out "fraud" in pension retirement plans; that it has always understood that it possessed the power; but that it chose to remain silent in both *deed* and *word* with regard to the existence of this power until after Mr. Daniel achieved his initial victory in the district court. And we expect the Court is astonished to find the SEC, which until now has been a vigorous advocate of the proposition that the antifraud provisions of the federal securities laws compel affirmative disclosures,[65] to now assimilate

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[65] See, e.g., Brief for Securities and Exchange Commission in *Affiliated Ute Citizens* v. *United States*, No. 70-78, Oct. Term, 1971:

> "What is required is not that all investors be equally judicious and prudent in their investment decisions, but that all material facts necessary to making of such decisions be placed before investors for evaluation, that no material facts which might reasonably influence those decisions be withheld.
>
> No single provision of the federal securities laws is more important as a safeguard of the investor's right to know than Section 10(b) of the Securities Exchange Act of 1934, as implemented by the Commission's Rule 10b-5 thereunder, * * *". (*Id.* at p. 5).

See also *id.* at 4-5, 62-67; Brief for Securities and Exchange Commission in *SEC* v. *Capital Gains Research Bureau*, No. 42, Oct. Term, 1963, pp. 19-23 and esp. p. 21, n.10; Brief for Securities and Exchange Commission in Opposition to Petition for Writ of Certiorari in *SEC* v. *Texas Gulf Sulphur, cert. denied sub nom, Coates* v. *SEC*, No. 897, Oct. Term, 1968, p. 37; *Ward La France Truck Corp.*, 13 SEC 373 (1943); *Hughes & Treat*, 22 SEC 623, 626 (1946); *Cady, Roberts & Co.*, 40 SEC 907 (1961); SEC Releases Nos. 34-6721 and 33-4445 (1962): Distribution by Broker-Dealers of Unregistered Securities; SEC Releases 33-5092 and 34-8995 (1970): Timely Disclosures of Material Corporate Developments; SEC Releases 34-

those provisions to a "generalized prohibition against fraud" (SEC Br. 5) and take exception to the "suggest[ion of the court below] that the antifraud provisions impose an obligation to make "affirmative disclosures" (SEC Br. 4-5).[66]

9239, 33-5168 and 34-9143 (1971): Offering of Securities as Substitute for Savings Account Deposits, etc.; SEC Releases 33-5226 and 34-9444 (1972): Applicability of Anti-fraud Provisions to Certain Acts and Practices Regarding Non-public Offerings; SEC Releases 33-5447 and 34-10569 (1973): Disclosure of the Impact of Possible Fuel Shortages on the Operation of Issuers; Report of the Securities and Exchange Commission to the Senate Committee on Banking, Housing and Urban Affairs on Questionable and Illegal Corporate Payments and Practices (May 12, 1976), p. 19, n. 17. Indeed, in the Commission's book, the affirmative disclosure obligations imposed by the antifraud provisions are so much a matter of black letter law that the SEC General Counsel who authored its brief here, could state in an earlier writing without citation or reference other than to the sections of the statute and the Commission's rules:

> The disclosure requirements of the federal securities laws which are applicable to the transactional context are the antifraud strictures contained in several of the statutes administered by the Commission, the registration provisions of the Securities Act, and the tender-offer sections of the Securities Exchange Act. Both the antifraud and registration provisions are directly related to disclosures which must be made in the context of a proposed securities transaction. Each assumes that prior to making an intelligent investment decision an investor must be furnished with certain facts.

Sonde & Pitt, *Utilizing the Federal Securities Laws to Clear the Air! Clean the Sky! Wash the Wind!*, 16 How. L.J. 831 (1971).

[66] Seeking to minimize the impact of the SEC's position in this case, SEC Chairman Williams told the Chairman of the Senate Committee on Human Resources:

> The antifraud provisions of the federal securities laws are essentially a prohibition against fraudulent conduct; they are a direction not to be deceptive or misleading. * * * [T]he antifraud provisions * * * simply cannot be characterized as 'disclosure' requirements."

Letter of January 5, 1978 reproduced in BNA Daily Tax Report, Jan. 12, 1978.

Having diluted the antifraud provisions of the federal securities laws to nothing more than "a generalized prohibition against fraud", the SEC has the temerity to argue to this Court that only the federal securities laws, the statutes which it administers, provide adequate protection to "defrauded participants in pension funds" (SEC Br. pp. 3-4); that unless the antifraud provisions of the federal securities laws are held applicable, pension fund participants will be without protection from fraud; and that if participants are to be denuded of such protection, that choice should be made by Congress not by this Court (SEC Br. 5). In its rhetoric it turns a blind eye on common law fraud and deceit and the legal obligations flowing from well established fiduciary principles.[67]

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[67] Plaintiff, whose complaint contains counts for common law fraud and deceit, breach of common law fiduciary duty, violation of the "exclusively for the benefit" requirements of Section 302(c) (5) of the Taft-Hartley Act, and breach of the duty of fair representation requirement of Section 9(a) of the National Labor Relations Act, does not embrace the federal securities laws as the sole basis for possible relief. However, his brief attempts to deprecate those other claims by ambiguous claims that: "[o]ther federal statutes and state laws are not designed to remedy the type of securities fraud present here" and "provision of a remedy under the federal securities laws is likely to make the most efficient use of limited judicial and legal resources." (Pl. Br. 41). The latter cryptic reference undoubtedly means that since a securities action for omissions to disclose material facts, such as actuarial assumptions, presents an arguably common issue of fact and law supporting a class action on behalf of every person whose work resulted in employer contributions to the pension fund, plaintiff's counsel would prefer to press that cause of action rather than one which narrowly relates to Mr. Daniel's specific allegations.

Daniel's counsel has advised the district court that the fact that plaintiff had a break-in-service (which resulted in the denial of his pension) is irrelevant to the broad based class action security count. (See Local 705 Reply Br. 1, n.1) But if, as Mr. Daniel contends, he was deprived of his pension by reason of the application of a "Draconian", arbitrary and capricious break-in-service rule and particularly one of which he had no knowledge, relief sought under Section 302(c)(5) would break no new ground. *Burroughs* v. *Board*

As this Court has twice recently said, the federal securities laws were not intended to be a universal panacea. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 859-60; *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 479-80. Moreover, to apply the antifraud provisions of the federal securities law prospectively would superimpose upon the carefully wrought disclosure provisions of ERISA another and different disclosure standard, and to apply those provisions retrospectively would spring a trap for all pension funds that lacked the power to foresee both that the securities laws would be held applicable and that which class action litigants would argue and courts would agree constituted required disclosure.[68]

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of Trustees, 542 F.2d 1128 (C.A. 9). See also *Pete* v. *United Mine Workers*, 517 F.2d 1275 (C.A.D.C.); *Johnson* v. *Botica*, 537 F.2d 930 (C.A. 7); *Norton* v. *I.A.M. Nat. Pension Fund*, 553 F.2d 1352 (C.A.D.C.); *Knauss* v. *Gorman*, —— F.2d ——, BNA Daily Labor Report, Aug. 25, 1978, p. D-1 (C.A. 3). But see *Lugo* v. *Employees Retirement Fund*, 529 F.2d 251, 256, 259 (C.A. 2) *cert. denied*, 429 U.S. 826. Indeed, the common law has found remedies for such conduct without reference to § 302(c)(5). *Mitzner* v. *Jarcho*, 44 N.Y.2d 39, 403 N.Y.S.2d 490, 374 N.E.2d 388.

Daniel's claim, which arises from pre-ERISA conduct, is, of course, governed by the law as it existed pre-ERISA. Accordingly, the complaint asserts only non-ERISA causes of action. If we were dealing with post-ERISA conduct, the prior existing federal cause of action referred to above has not been nullified by ERISA's enactment because Congress was conscious of its co-existence with ERISA (pp. 77-78, *infra*), (§ 514(d)), although state common law remedies have been nullified (§ 514(a),(b)(1),(c)). In place of state common law standards and remedies, Congress opted in ERISA to deal with violations, including violations of the specific disclosure obligations imposed by Title I, by requiring that disclosure documents be filed with the Department of Labor (§ 104); by imposing federal criminal sanctions for wilful violations (§ 501); and by authorizing Labor Department as well as participant suits for injunctions and to obtain "appropriate equitable relief * * * to redress such violations." (§ 502(a)).

[68] "There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739.

When it suits its purpose the SEC argues here and to the Congress that the antifraud provisions merely require one to refrain from being dishonest. At other times when speaking in this case the Commission weasels as to whether and what disclosures are required, *e.g.*, the antifraud provisions do not establish a system of *detailed specific affirmative* disclosures (SEC Br. at 26); "there is no '*specific* rule' as to what facts are material and that determination must be made 'on a case-by-case basis * * *.' " (SEC CA Br. 51, n.73); "[i]f a person chooses to make a representation which is rendered misleading by the failure to disclose other facts, he is obligated to make further disclosures [b]ut, the antifraud provisions do not constitute a *general* requirement of *detailed affirmative* disclosure * * *." (SEC Br. CA 58) (our emphasis). We submit that it is the very absence of detailed, specific disclosure requirements under the antifraud provisions which make it manifest that, unlike ERISA's specific "safe harbor" disclosure requirements, application of the antifraud provisions would leave the door wide open to contentions of material omissions which could subject even the most careful plan administrators to suit.

B. As we pointed out in our opening brief, in ERISA Congress addressed the substance of required pension plan disclosures in very precise terms. (IBT Br. 84.) Not only the mode of disclosure (§ 101) but its content as well was expressly delineated (§§ 102, 103). Thus, the summary plan description, the key disclosure document, is required to cover eleven specified categories of information, including "the plan's requirements respecting eligibility for participation and benefits"; the "provisions providing for nonforfeitable pension benefits"; the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits", and "the source of financing

of the plan."[69] Another important disclosure document, the annual report, must contain a financial statement with specifically describes items and schedules catalogued in § 103(b). A reading of Title I of ERISA and its pertinent legislative history shows that Congress made very deliberate choices as to what would be disclosed, and how, and when.[70]

By contrast, no one can list, let alone comply with, what would be required under an antifraud regime. The Court of Appeals in this case has said that plans should disclose their actuarial assumptions (A. 255).[71] The court also suggested that mere disclosure of the circumstances which result in denial of benefit (as ERISA requires) may inadequately describe the "risk of loss".

The complaint alleges, *inter alia*, omissions of actuarial information (A. 33). Although plaintiff has somewhat tempered his position in this Court with respect to *required* disclosures, his brief to the court below listed risks of nonparticipation for a period sufficient to vest, including risk of layoff. (Pl. CA Br. 56-58.) His brief

[69] ERISA § 102(a)(1) requires that the summary plan description be written in a manner calculated to be understood by the average plan participant. Department of Labor Regulation § 2520.102-1 states that "The format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries."

[70] Although less demanding, the WPPDA likewise provided for specific disclosures. That Act set forth explicit disclosure requirements for the description of the plan (§ 6) and for the annual financial report (§ 7). These documents were to be available for examination in the principal office of the plan and upon request were to be mailed, along with "an adequate summary" of the latest annual report to any participant and beneficiary upon request (§ 8(a)). The WPPDA provided specific times for both publication and filing. (§ 6(a), 6(b), 47(a)).

[71] ERISA requires actuarial reports as part of the annual report required to be filed and to be made available to participants in accordance with §§ 103 and 104.

here summarizes the scope of required disclosures by reference to the standard of *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 450: "all facts which a reasonable investor would consider important in the making of an investment decision" (Pl. Br. 105). But plaintiff's inventiveness has not come to an end. He includes here for the first time the claim that "the Teamster union" has committed "securities fraud" by "establish[ing] a scheme of approximately 230 pension funds with (until recently) few rights of portability between different Teamster funds * * *" (Pl. Br. 15).[72] *Amici*

[72] This accusation is unsupported and unsupportable. The plans are the result of bargaining by local unions for their respective members. Local 705 is one such local union and it is its pension plan which is at issue here. (See Local 705 Reply Br. 2, n.3). In truth the Teamster pension plans have led the way on the portability issue. In his study of reciprocity among private multiemployer pension plans, Professor Maurice E. McDonald found, "the earliest formal pension reciprocity agreement documented during the course of this study was effectuated on August 1, 1952, by Teamsters' Locals 707 and 807 in New York. In 1954 these locals were joined in a reciprocity arrangement with the Northern New Jersey Truckers." McDonald, *Reciprocity Among Private Multiemployer Pension Plans*, Pension Research Council, Wharton School, University of Pennsylvania (Homewood, Ill., Richard D. Irwin, Inc., 1975) at 23 n.1.

A recent study of reciprocity among private multiemployer pension plans found that 33.4% of all Teamsters are covered by plans having reciprocity. This compares favorably with employee coverage in other occupational categories surveyed: 36.5 percent for employees in construction, 21.2 percent for employees in manufacturing and 8.9 percent for employees in service occupations. (*Id.* at 51). In sum, "there are relatively few remaining Teamsters plans which do not have, or have access to, relatively broad pension reciprocity." (*Id.* at 60.)

Plaintiff gives no thought to the mechanics for creating or carrying out a system of pension portability. Portability requires the agreement of both the employer where the employee accrued the credits to transfer and the employee's new employer. No union can unilaterally provide for portability.

While multiemployer bargaining might facilitate portability, it would be a violation of the labor laws for a union to coerce an employer into such an organization. *Florida Power & Light Co.* v

International Brotherhood of Electrical Workers, Local 641, 417 U.S. 790; *NLRB* v. *Local 264, Laborers' International Union of North America*, 529 F.2d 778 (C.A. 8); *NLRB* v. *Local 964, United Brotherhood of Carpenters & Joiners*, 447 F.2d 643 (C.A. 7); *Glass Workers Local 1892 (Frank J. Rooney, Inc.)*, 141 N.L.R.B. 106 (1963); *I.L.W.U. Local 8 (General Ore, Inc.)*, 126 N.L.R.B. 172 (1960). Even insisting that multiple employers agree to a uniform contract has been held to be *de facto* coercion of multiemployer bargaining. *Frito-Lay, Inc.* v. *International Brotherhood of Teamsters*, 401 F.Supp. 370, 376 (N.D.Calif.). Plaintiff's assumption that less than unified pension coverage for all members of all Teamster unions constitutes securities fraud is at odds with his equally vociferous argument that such an expansive interpretation of the securities laws "Will Not Distort the National Collective Bargaining System" (Pl. Br. 108).

The difficulties of negotiating portability are compounded by the fact that the pension plans of the various Teamsters locals which are negotiated separately, differ in eligibility requirements, contributions, benefits and a myriad of other ways. Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 1st Sess. (1977), Testimony of Daniel J. Shannon, Executive Director, Central States, Southeast and Southwest Areas Pension Fund p. 356; Hearings before the General Subcommittee on Labor, House Committee on Education and Labor, 93d Cong., 1st Sess. (1973), testimony of Stetson B. Harman, President, Trust Division, The American Bankers Association at 166-167. "I think it is very unfortunate that the bill introduced in the Senate lays such emphasis on portability. I think portability is presently a total impracticability. There is practically no method for implementing this concept or adopting it to the many plans available, each with many different assumptions, many different benefits. I think it would lead to absolute chaos in the whole field and would provide no gains specifically for the employees" Id. at 183. As an authority cited by the SEC has noted, "Portability is difficult if not impossible to achieve with partially funded pensions." Hearings before the Subcommittee on Fiscal Policy, U.S. Cong. Joint Economic Committee, 91st Cong., 2d Sess. 14. The testimony of Professor William L. White of the Graduate School of Business Administration, Harvard University is cited at SEC Br. 16.

It ought to be remembered that Congress declined to create a system of mandatory portability even though its concern with its general unavailability permeates the legislative history. I ERISA Leg. Hist. 91, 190, 196-7, 203, 209, 221, 588, 596-7, 609-10, 628-9, 1074-5, 1098-9, 1139-46; II ERISA Leg. Hist. 1613-14, 1620, 1627-28, 1839-47, 2618-19. Instead Congress provided for "advice and assistance" to those who voluntarily choose "to evaluat[e] the desirability" of portability. ERISA § 1309, 29 U.S.C. § 4009. This is far less than various Teamster pension plans have accomplished.

suggest, among other things, that the fund should be required to disclose "both the risks arising out of a fund's participating in the capital markets and the risks that may preclude the [employee] investor from benefiting from the fund's participation in the capital markets" (PROD Br. 16.)

Thus, the proponents of securities law coverage in this case are unable to agree as to what must and what need not be disclosed to employees under the regime which they advocate. This provides a small foretaste of the uncertainties with which pension plan administrators and sponsors would have to contend if plaintiff prevails. When such major uncertainties are compared with Congress' careful delineation of what must be disclosed, two things become apparent. First, that Congress did not intend to permit pension funds to be beset by such a state of chaos. Second, that Congress has made a judgment of the extent of the disclosure burden that should be imposed upon pension plan sponsors. The real danger to Congressional policy which this case presents, is that it intrudes the securities laws into the elaborately detailed structure which Congress has established in ERISA, and it creates retroactive liability in the teeth of Congress' judgment in that statute that pension plans should not be burdened by unforeseen liabilities.

Whatever the SEC may say by way of minimization of the impact of application of the antifraud provisions of the federal securities laws, litigants will argue, as Daniel and his supporting *amici* did here, that specific disclosures were and are required to avoid pension fund liability under those laws (Pl. Br. 105, Gray P. Br. 15-21, PROD Br. 10-11, 16-17, 22-23). Moreover, as the decision below illustrates (A. 254-255), courts may find those arguments very attractive. The SEC may denigrate as mere "dictum" (SEC Br. 25), that discussion of disclosures which that court regarded as appropriate under a securities law standard, but it represents the unanimous view of the panel which heard the case and is indi-

cative of the kinds of conclusions that may well be reached by other lower courts were this Court to subject these pension plans to the regime of the securities laws.

This Court said in *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, that a "fundamental purpose, common to [the federal securities] statutes was to substitute a philosophy of full disclosure for the philosophy of caveat emptor * * *" (*Id.* at 186) and emphasized the obligations of affirmative disclosure by quotation of Dean Shulman's observation with respect to the impact of the federal securities laws on securities transactions that: "what is required is 'a picture not simply of the show window, but of the entire store * * * not simply truth in the statements volunteered, but disclosure.'" (*Id.* at 201). The point was further driven home in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, where in a suit arising under § 10(b) and Rule 10b-5, the Court had occasion to reemphasize that "full disclosure" is a "fundamental purpose" of the 1934 Act and to find liability for nondisclosures notwithstanding the circumstance that the defendants "may have made no positive representation or recommendation." (*Id.* at 151 and 153). Moreover, until the SEC chose to lower the banner of full disclosure in an effort to avoid recognition of the full implication of the position which it espouses in this case, the Commission, as has already been shown (see n. 65, *supra*), has been both a forceful advocate and promulgator of the position that the antifraud provisions compel affirmative disclosures.[73]

In Nader and Blackwell, *You and Your Pension*,[74] the observation is made: "[M]illions of the people—possibly many more than half—who expect pensions never get

[73] Even in this case, as we have also shown (*supra* at pp. 3-5), the articulations of its position on affirmative disclosures are carefully wrought to allow maximum freedom in its future positions.

[74] Nader and Blackwell, *You and Your Pension*, (New York, N.Y., Grossman Publishers, 1973).

them." Although this fact is said to have "long been recognized by [among others] employers, union leaders [and] pension managers", it is maintained that few "expectant pensioners" realize this. (*Id.* at p. 1). Professor Dan M. McGill of the University of Pennsylvania, testifying in 1972 before the House Subcommittee on Labor with respect to pension plans stated: "Unfortunately, the promises have not always been clearly communicated to the participants, leading to pension expectations that may not be fulfilled.[75] A case in point is failure to indicate the circumstances under which the expected benefits would not be paid." The SEC cites additional pre-ERISA testimony establishing that the "tendency [of employers] ha[d] been to present the [pension] plan in the most positive terms possible * * *. This leads to over simplification[76] and an advertising sales approach." (SEC Br. at 73 quoting testimony of Ernest Griffes on behalf of the American Society for Personnel Administration, Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 765 (1973)).

These observations led the Congress to enact ERISA with its carefully prescribed disclosure obligations, but they also demonstrate how widespread liability exposure

[75] Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 3598, 92d Cong., 2d Sess. 207 (1972).

[76] In this connection, it is to be noted that aside from the novel contentions with respect to nondisclosure of actuarial assumptions and plan performance, the principal thrust of plaintiff Daniel's claim of misrepresentation will necessarily be that the language of the Local 705 Pension Plan booklet, which referred to the requirements of "twenty consecutive years" of employment with a covered employer under contract with Local 705 and payment "continuously [of] the required weekly payments beginning with January 1, 1955", failed to adequately apprise plaintiff of this requirement. (1958 Local 705 Health and Welfare and Pension Fund Booklet A. 68 at 2).

would be if the antifraud provisions of the federal securities laws are held to have been applicable to the typical noncontributory compulsory pension plan. Indeed, every employer and every pension administrator whose pension plan complied with the requirements of the Welfare and Pension Plans Disclosure Act of 1958 will be exposed to liability. If one gives sway to one of the SEC's articulations of the requirements of the antifraud provisions in its *amicus* brief below: "If a person chooses to make a representation which is rendered misleading by the failure to disclose other facts, he is obligated to make further disclosures" (SEC CA Br. 58), it is not difficult to postulate a violation when a personnel interviewer advised a prospective employee that, in addition to other fringe benefits, the company has a pension plan which pays $300 a month on retirement at age 65 and did not then and there explain, at the very least, *all* of the plan provisions with respect to vesting and eligibility. Even meticulous compliance with the disclosure obligations of ERISA will not have served nor will they serve to insulate from liability. For example, while ERISA requires disclosure of the length of time one must be employed for vesting and for a full pension, it does not provide for disclosures with respect to matters which can vitally affect the employee's retention of employment. Thus, for example, an employer who has determined that it will eventually close a plant with the inevitable consequence of employee termination, but failed to advise employees of that fact while they were making "continuing investments" in a noncontributory pension plan by coming to work each day, could be found to have violated its obligation to make a "further disclosure" beyond that mandated by ERISA.

The potential "social cost" of these exposures to litigation and liability, and of noninstitution of new pension plans and termination of existing ones, argue forcefully

that especially after 40 years of quiescence, the securities laws should not be held applicable to employee coverage under an employer funded, compulsory pension plan. They also argue that even if the securities laws are now held to be applicable, this entails disclosure obligations not heretofore anticipated, and the considerations of *Los Angeles Dept. of Water and Power* v. *Manhart*, —— U.S. ——, 98 S.Ct. 1370, mandate prospective application only.

C. The statute of limitations and the requirement of scienter under § 10(b) of the 1934 Act, to which plaintiff and the SEC point as reducing potential exposure, are unlikely to provide comfort to pension funds. The District Court has already held in this case that because of the tolling principle applicable to claims of "fraud" there is a question of fact as to when the statute of limitations begins to run.[77] (A. 111) Such a question of fact not only preserves the pension funds' exposure for "securities law fraud" but exacerbates the problem of defending such actions by permitting liability to rest on conflicting versions of what the disappointed pension applicant was or was not told when he first obtained his job, perhaps twenty or more years earlier, or at any other time during his covered employment. The problems of proof which concerned the Court in *Blue Chip* (IBT Br. 53-57, 139) would thereby be presented in aggravated form. Plaintiff's contrary contention that his "purchase of an interest in the Local 705 Pension Fund is subject to independent documentary verification" (Pl. Br. 122), aside from again begging the legal issue of whether his working constituted a "purchase of an interest * * *," conveniently overlooks the real factual issues which would arise

[77] While IBT disagrees with plaintiff's position below that the statute of limitations did not begin to run until plaintiff discovered that he would not receive a pension, the Court's invocation of the tolling principle is supported by precedent, *see*, Jacobs, *The Impact of Rule 10b-5*, (New York, N.Y., Clark Boardman Company, Ltd., 1972) at ¶ 235.03.

if his legal theory were accepted, such as what the plaintiff was and was not told by the plan trustees or their agents, what he knew from other sources and whether those representations actually caused him to take or keep his job.

It is also very much an open question whether the absence of scienter would limit pension funds' actual exposure. "Scienter" is a state of mind which it will be argued can be inferred from knowing nondisclosure coupled with a possible financial motivation, such as an employer's desire to recruit or retain employees but ultimately save pension fund contributions. The example given earlier makes the point, for could not a jury permissibly infer that the employer had an intent to deceive his employees from (a) the nondisclosure of the contemplated plant closing and (b) the pension cost savings ultimately resulting from employee layoffs? Similarly, an employer's normal desire to recruit employees could be said to support motive for deceit when employes were advised of the existence of a pension plan, but were not informed that the plan operates on the assumption that half the employees will quit before achieving vesting.

Moreover, the SEC's position on this point is somewhat disingenuous. For while it points out, after listing four elements that "a private plaintiff [must] demonstrate" to establish "violation(s) of the antifraud provisions" as limiting "any retroactive liability" (SEC Br. 27-28), it adds that "To establish a violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder, a private plaintiff must also establish that the defendant acted with *scienter*." (SEC Br. 28, n.22.) But it fails to note that since *Ernst & Ernst* the SEC has maintained that "reckless disregard" is sufficient to satisfy the scienter requirement and that *Ernst & Ernst* is inapplicable to actions brought by the SEC itself to enjoin violations of § 10(b) and Rule 10b-5.

In such actions the SEC has on occasion sought and obtained court orders requiring the defendant to make substantial monetary payments by way of restitution.[78] Moreover, while the SEC correctly points out that it is an open question whether scienter is required under § 17(a) of the 1933 Act, there is no basis for its assertion that the Court of Appeals held that it is required; nor does the SEC mention that its position has been that there is no such requirement even in private actions, nor does the SEC observe that it has for some years urged, contrary to its original position, that § 17(a) does give rise to an implied private cause of action.[79] If those SEC positions should ultimately be sustained, the absence of scienter would of course provide no protection against liability; the SEC therefore cannot consistently adhere to its views on § 17(a) and the limited reach of *Ernst & Ernst*, and suggest that *Ernst & Ernst* meaningfully limits the pension funds' exposure. Perhaps to submerge the mutual inconsistency of its various contentions or recognizing the vulnerability of its position, the SEC says that this Court need not decide whether § 17(a) gives rise to an implied private cause of action.[80] But that issue must be reached if, contrary to our view, but in accord with that of the SEC, the antifraud provisions of the securities laws extend to plaintiff's claim, and the presence or absence of the scienter

[78] See the cases and briefs cited in NCCMP Br. 20-21, n.18; Note, *The Scienter Requirement in SEC Injunctive Enforcement of Section 10(b) After Ernst & Ernst* v. *Hochfelder*, 77 Colum. L. Rev. 419, 442-43, n.126 (1977).

[79] Brief of Securities and Exchange Commission as *amicus curiae* in *Blue Chip*, No. 74-124 p. 12, n.10. But see, pp. 76-77, *infra* and Local 705 Br. 62-3 where the SEC's original position is set forth.

[80] SEC Br. 28, n.22. Contrast the SEC's 194 page brief in *Piper* v. *Chris-Craft*, Nos. 75-353, 75-354 and 75-355, urging that such causes of action lie under SEC Rule 10b-6 of the 1934 Act and § 13(d) of the Williams Act.

requirement is to be considered in determining whether retroactive liability may be imposed, notwithstanding *Manhart*.

On the merits of the implied liability issue we need add only the following:[61]

1) Pl. Br. 28-29, n.35 misquotes Prof. Loss' treatise and thereby totally distorts its position. What appears, in plaintiff's brief, to be a complete sentence actually omits (without indication) the beginning: "Although this was said many years before the *Kardon* case, there is nothing * * *". 3 Loss, *Securities Regulation* 1785 (2d ed., 1961). By "this", Prof. Loss referred to Commissioner Landis' *denial* that there is civil liability under § 17(a) (quoted at Local 705 Br. 60-61). And immediately following the passage quoted by plaintiff, the following appears (*id.*, emphasis in original):

> The question is simply whether there is the same justification for implying such liability under the 1933 act as there is under the 1934 act. It is one thing to imply a private right of action under § 10 (b) or the other provisions of the 1934 act, because the specific liabilities created by §§ 9(e), 16(b) and 18 do not cover all the variegated activities with which that act is concerned. But it is quite another thing to add an implied remedy under § 17(a) of the 1933 act to the detailed remedies specifically created by §§ 11 and 12. The 1933 act is a much narrower statute. It deals only with disclosure and fraud *in the sale of securities*. It has but two important substantive provisions, §§ 5 and 17(a). Noncompliance with § 5 results in civil liability under § 12(1). Faulty compliance results in liability under § 11. And § 17(a) has its counterpart in § 12(2). It all makes a rather neat pattern.

[61] Petitioner IBT *does* raise the issue of whether section 17(a) gives rise to an implied private cause of action. See IBT Br. 36, n.22 (continued) adopting Local 705's Brief on this issue. The contention that the issue is not properly here (Pl. Br. 28, n.35, referring to *respondent's* rephrasing of the question presented) is likewise without merit. The issue is within the precise terms of the second question presented by the Petitions for Certiorari and was discussed as a reason for granting the writ. (See IBT Pet. 2, 30, n.39 and Local 705 Pet. 2, 42-44) Petitioner's briefs have not rephrased the question (See IBT Br. 2; Local 705 Br. 2).

2) In the course of his testimony at the 1941 Hearings, SEC Commissioner Purcell said, referring to "the fraud provisions of § 17(a): "Any person who fraudulently sells securities, whether or not exempted, can be enjoined by the courts at the suit of the Commission or can be criminally prosecuted in case of willful violations by the Department of Justice." (1941 Hearings 920. This is the passage represented by asterisks at SEC Br. 75). See also 1941 Hearings at 806 quoted at Local 705 Br. 62. In the SEC's 1941 Report (cited at SEC Br. 75-76, n.59), the following appears at p. 13:

> Sections 11 and 12 of the Securities Act contain the provisions imposing civil liabilities and section 13 specifies the limitations of time within which actions may be brought.

D. Our adversaries' reliance on § 514(d) of ERISA, 29 U.S.C. § 1144(d), (Pl. Br. 98-99 and SEC Br. 91-92) is misplaced. By that provision Congress undoubtedly preserved § 302(c)(5) of the Taft Hartley Act, and all other federal legislation affecting pension plans which Congress was aware of on the basis of its intensive study. Thus, we have no doubt that voluntary contributory pension plans which invest in the securities of the employer company in an amount greater than that paid into the plan by the employer "remain subject to the registration requirements of the 1933 Act, for that duty was spelled out in the Interim Report (See IBT Br. 73-74, n.62). Had § 514(d) not been contained in the Bill, the survival of that duty would have been put in question. § 514(d) also preserved the federal securities

laws insofar as they affect private pension funds in their capacity as purchasers and sellers of securities in the funds' investment portfolios. This is but one example of the ways in which § 514(d) pretermits doubt, which would otherwise have been invited by the very comprehensiveness of ERISA, that general legislation would remain applicable with respect to subjects not dealt with in ERISA.

However, Congress did not, by enacting § 514(d) (or its predecessor § 10(a) of the WPPDA) intend that courts would so construe earlier federal laws that they would appear, like a *deus ex machina*, to disrupt the carefully wrought design in establishing disclosure, fiduciary and other standards for pension plans. Congress knew, or thought it knew, that with respect to these subjects it was occupying the field and establishing a unitary scheme of administration. That is made clear by § 3004 of ERISA which admonishes against duplicative and conflicting regulations and administration. While § 3004 was discussed at IBT Br. 78-79, it is totally ignored by our adversaries. If settled principles of statutory construction are to be followed, then § 514 (d) must be read not only against the background of Congress' understanding of what federal laws were thereby being preserved, but also in harmony with § 3004 in which Congress expressly confronted "the question of arranging a workable administrative and enforcement structure". See *id.* 78, n.69 (quoting Sen. Williams). The policies of § 3004 were reaffirmed and further implemented by Reorganization Plan, No. 4 of 1978, which has been approved by both houses of Congress.[92] As the President observed, that plan "will reduce jurisdictional overlap and duplication by clearly dividing responsibility for ERISA regulation between the Departments of Labor and Treasury[, and] reduce substantially ERISA's administrative burden on both businesses and labor unions by reducing the time required to process applications for exemptions from prohibited transactions and accelerating the issuance of the remaining regulations."[93] The national policy thus reaffirmed and perfected should not be nullified by accepting the misguided notion that it would "impliedly repeal" the securities laws by confining their necessarily general jurisdictional language within the context of "the capital market of the enterprise system" which is their "focus."

[92] 43 F.R. 47,713 (Oct. 17, 1978).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case remanded with direction to the District Court to dismiss Counts I and II of the complaint.

Respectfully submitted,

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[93] 14 Weekly Compilation of Presidential Documents, No. 42.